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No. 187

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# Supreme Court of the United States

OCTOBER TERM, 1962

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association; G. W. MINSON, individually and as Secretary, General Committee of Adjustment, Chicago and North Western Railway Company, and Local Chairman of said Association; A. O. BEST, individually and as Local Chairman of said Association; HOWARD R. GILLETTE, individually and as Local Chairman of said Association; R. B. SEGER, individually and as Secretary and Local Chairman of said Association; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association; W. I. CARREL, individually and as Vice Chairman of said Association; K. O. WHITE, individually and as Local Chairman of said Association; VAUGHN R. WARD, individually and as General Chairman of said Association; E. H. DONNELLY, individually and as Vice Chairman of said Association; J. R. MAYER, individually and as Local Chairman of said Association; BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association; W. A. BURKE, individually and as Vice Chairman and Local Chairman of said Association; T. A. MILLER, individually and as Local Chairman of said Association; E. STOUVENEL, individually and as Local Chairman of said Association; M. VITIRITTO, individually and as Local Chairman of said Association; R. W. STANLEY, individually and as General Chairman of said Association; H. L. HEMPHILL, individually and as Local Chairman of said Association; SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association; E. H. KANE, individually and as General Chairman of said association; E. K. BRAINERD, individually and as Local Chairman of said Association, *Petitioners*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A Corporation, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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# Supreme Court of the United States

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association; G. W. MINSON, individually and as Secretary, General Committee of Adjustment, Chicago and North Western Railway Company, and Local Chairman of said Association; A. O. BEST, individually and as Local Chairman of said Association; HOWARD R. GILLETTE, individually and as Local Chairman of said Association; R. B. SEGER, individually and as Secretary and Local Chairman of said Association; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association; W. I. CARREL, individually and as Vice Chairman of said Association; K. O. WHITE, individually and as Local Chairman of said Association; VAUGHN R. WARD, individually and as General Chairman of said Association; E. H. DONNELLY, individually and as Vice Chairman of said Associations J. R. MAYER, individually and as Local Chairman of said Association; BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association; W. A. BURKE, individually and as Vice Chairman and Local Chairman of said Association; T. A. MILLER, individually and as Local Chairman of said Association; E. STOUVENEL, individually and as Local Chairman of said Association; M. VITIRITTO, individually and as Local Chairman of said Association; R. W. STANLEY, individually and as General Chairman of said Association; H. L. HEMPHILL, individually and as Local Chairman of said Association; SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association; E. H. KANE, individually and as General Chairman of said association; E. K. BRAINERD, individually and as Local Chairman of said Association, *Petitioners*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen, Switchmen's

Union of North America, unincorporated associations, and certain officers of each of these labor organizations representing employees of the Chicago and North Western Railway Company, pray that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Eighth Circuit which affirmed the judgment of the District Court of the United States for the Southern District of Iowa.

## OPINIONS BELOW

The opinion and judgment of the District Court (R. 331-346) is reported in 202 F. Supp. 277, and is reproduced at pages 1a-17a of the Appendix to this Petition.[1] The opinion of the United States Court of Appeals is reported in 314 F. 2d. 424, and is reproduced at pages 18a-34a of the Appendix to this Petition.

## GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals sought to be reviewed was dated and entered March 7, 1963 (Appendix p. 34a(1)). A timely Petition for Rehearing was filed March 25, 1963, and was denied by order made and entered April 3, 1963 (Appendix p. 34a(2)). By orders entered on April 9 and May 4, 1963, the Court of Appeals entered a stay of its mandate to June 8, 1963, the stay to continue in force upon the filing of a writ of certiorari with this court. The statutory provision believed to confer jurisdiction of this court is 28 U.S.C., Section 1254.

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[1] The printed record before the United States Court of Appeals for the Eighth Circuit, including the proceedings in that court, has been certified to this court. The Appendix to this petition is separately printed and filed in accord with rule 23(1) of the rules of this Court.

## QUESTIONS PRESENTED FOR REVIEW

1. May a Federal court adjudicate the interpretation and application of a railway collective agreement authorized by Section 5(2)(f) of the Interstate Commerce Act and providing voluntary arbitration of certain disputes arising thereunder, and enter a judgment for specific performance of the agreement as so interpreted by the court, or should a dispute concerning its interpretation and application first be determined by the National Railroad Adjustment Board as provided by Section 3 of the Railway Labor Act?

2. In a Section 5(2) transaction under the Interstate Commerce Act, are the obligations of collective bargaining agreements negotiated pursuant to the Railway Labor Act "restraints, limitations or prohibitions of law" from which rail carriers are relieved by Section 5(11) of the Interstate Commerce Act?[2]

3. In a Section 5(2) transaction under the Interstate Commerce Act, are the procedures and provisions of the Railway Labor Act "restraints, limitations or prohibitions of law" from which rail carriers are relieved by Section 5(11) of the Interstate Commerce Act?

4. Do Sections 5(2)(f) and 5(11) of the Interstate Commerce Act vest power in the Interstate Commerce Commission over railway labor disputes, including the power to nullify the obligations of railway collective bargaining agreements and impose compulsory arbitration of such labor disputes occurring because of carrier proposals for operational changes following Com-

[2] A sale and purchase of assets had been approved by the Interstate Commerce Commission and had been consummated by the two railroads, parties thereto, prior to the inception of the labor dispute here involved between petitioners and respondent.

mission approval and consummation of a rail purchase under Section 5(2) of the Interstate Commerce Act, so as to supersede the provisions of the Railway Labor Act and the functions of the National Railroad Adjustment Board thereunder?

## STATUTES INVOLVED

The statutes involved are the Railway Labor Act (45 U.S.C., Sec. 151, *et seq.*), the pertinent portions of which are printed in the Appendix at page 35a; the Interstate Commerce Act (49 U.S.C., Sec. 1, *et seq.*), the pertinent portions of which are printed in the Appendix at page 35a, *et seq.*; and Section 301 of the Labor Management Relations Act (29 U.S.C., Sec. 185 reproduced in part in the Appendix at page 38a.

## STATEMENT OF THE CASE

On May 12, 1960, the Chicago and North Western Railway Company[1] filed an application under Section 5 (2) of the Interstate Commerce Act requesting the Interstate Commerce Commission to approve its proposed purchase of the properties and franchises of the Minneapolis and St. Louis Railway (R. 84-131). The agreement of sale between the two railroads was attached to the application (R. 106-127). It specified, among other things, that North Western would assume all obligations and liabilities of M & St L, including its collective bargaining agreements (R. 109, 111-112).

On August 1, 1960, the Interstate Commerce Commission, through an examiner, conducted a one-day hearing on the application (R. 132-197, 226). At the hearing North Western stated that it planned to operate

[1] The Chicago and North Western Railway will hereinafter be referred to as "respondent" or as "North Western". Petitioners will sometimes be referred to as "the employees".

the M & St L as a unit or separate division of North Western (R. 150). Respondent did not offer any evidence or refer to any plan for changing any of the work assignments or working conditions of the employees involved here and no suggestion or request was made to the Commission that the seniority rights of these employees, as provided in existing collective agreements, should be changed or modified (R. 132-197).

On August 4, 1960, a "Stipulation and Agreement" between North Western and the Railway Labor Executives' Association, representing among others the petitioners herein, was filed with the Commission (R. 200-224). It recited that the parties had reached an agreement "pursuant to the provisions of the Railway Labor Act, as amended", which provided protection of the interests of the employees and that any report or order issued by the Commission "may so state" (R. 200-201). The agreement referred to was the "Agreement of May, 1936, Washington, D. C.", commonly known as the Washington Job Protection Agreement,[1] as amended by the agreement of August 4, 1960, attached to the stipulation (R. 201, 205-224).

On October 13, 1960, the Commission issued its report and order authorizing the proposed acquisition of the M & St L by North Western (R. 225-244). The report contains the following regarding employees (R. 238):

> "Applicants also entered into a stipulation with railway labor organizations represented by the Railway Labor Executives' Association for the protection of all employees of the applicants whose

[1] Recognized by this court as a railway collective bargaining agreement in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 147 and in *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330, 337-339.

bargaining representatives are members of the association. The stipulation is of the character contemplated by section 5 (2)(f) of the act for the protection of railway employees who may be adversely affected by the transactions authorized. As to the employees covered by the stipulation, no conditions in our orders are necessary. As employees of the applicants not covered by the aforesaid stipulation, we will prescribe for their protection conditions similar to those set forth in Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177."

The purchase and sale of the assets of the M & St L to Northwestern was consummated by the two railroads on October 31, 1960 (R. 4). North Western took over the M & St L employees and thereafter dealt with their collective bargaining representatives under the terms of the M & St L collective agreements which North Western adopted (R. 3, 246, 248).

The dispute involved in this litigation commenced on December 13, 1960. By letter of that date, North Western notified the employees here involved (both North Western and former M & St L) that it contemplated "coordinating yard operations" at Marshalltown, Iowa, (R. 248-250).[5] It was undisputed

[5] While the evidence in this case was, by agreement, limited largely to Marshalltown, the respondent also proposed similar "coordinations" at other points on the railroad which it estimated would "directly affect" a total of 304 employees from the ranks of engineers, firemen and yard switchmen (R. 250, 305, 307). In contrast, North Western testified in the proceedings before the Interstate Commerce Commission that it did not contemplate any substantial economies through "consolidations;" that M & St L would be operated as "a separate division" or "unit", and that at a maximum the transaction would involve only 125 to 150 employees "most of whom would be in the accounting department of the M & St L" (R. 148-150).

that the operational changes proposed by North Western would either violate the seniority rights of both North Western and former M & St L employees or would necessitate changes in their collective bargaining agreements limiting their respective seniority rights to defined geographical districts or yards (R. 8, 65-67, 246-247, 340). The Court of Appeals said (Appendix p. 23a):

> "It is agreed that the unification of the yards at Marshalltown will affect the seniority rights of the employees who are presently assigned to those yards. Their seniority rights arise out of separate collective bargaining agreements with North Western and M & St L, and consequently they do not apply uniformly to both groups of employees."

The Railway Labor Act provides that (45 U.S.C., Sec. 2, Seventh):

> "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees except in the manner prescribed in such agreements or in Section 6 of this Act."

North Western denied that its bulletin of the proposed change was a Section 6 notice under the Railway Labor Act and asserted that the Railway Labor Act was "inapplicable" by reason of the Interstate Commerce Act and the proceedings before the Interstate Commerce Commission (R. 8-19, 46, 337).

Failing to reach a settlement, North Western advised the employees that it intended to submit the controversy to arbitration "as provided in Section 13 of the Agreement of May 1936, Washington, D. C., as revised by Agreement of August 4, 1960" (R. 270). The employees directed attention to the fact that the

arbitration provisions of the Washington Agreement were limited to disputes concerning the "protection" afforded by it and that the agreement did not contain any provision for arbitrating changes in their collective agreements defining their seniority rights (R. 203, 282).

North Western thereafter notified the employees that it had designated one of its officers to serve on the proposed arbitration committee (R. 271). The employees did not designate a member for the proposed board and North Western thereupon requested the National Mediation Board to designate a neutral member of the proposed arbitration committee (R. 277-278). The Mediation Board arranged and held a conference with the parties in Chicago, Illinois, on May 18, 1961. While it made no formal ruling or written denial of North Western's request, it did not accede to the request or act to appoint a neutral arbitrator (R. 17, 296, 330, 338).

On July 14, 1961, North Western filed its complaint in the Federal District Court for the Southern District of Iowa against petitioners as the collective bargaining representatives of the employees involved (R. 1-20). Jurisdiction was founded on the alleged existence of a federal question under Sections 1331 and 1337, 28 U.S.C. (R. 45-46).[6] The matter in controversy was said to arise under the Interstate Commerce Act, 49 U.S.C., Sections 1 *et seq.*, the Railway Labor Act, 45 U.S.C., Sections 151 *et seq.*, and Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185 (R. 46).

The complaint sets forth the report and order of the Interstate Commerce Commission relating to the ac-

[6] Diversity jurisdiction, originally alleged, was later eliminated by amendment (R. 2, 45-46).

quisition of M & St L by North Western, the "Stipulation and Agreement" incorporating the Washington Agreement of 1936, alleges the geographical limits of the seniority rights of the employees involved, the general outlines of the dispute, and prays for a declaratory judgment that the court "declare the legal rights of the parties", that the court "declare that the Railway Labor Act is inapplicable to the proposed coordination of plaintiff's Marshalltown yards", and that the court "declare that pursuant to the order of the Interstate Commerce Commission * * * and the stipulation of August 4, 1960, the proposed coordination be lawfully effectuated in accordance with said order and the procedures prescribed in said stipulation and the Washington Agreement" (R. 1-20, 45-46).

Petitioners filed a motion to dismiss the complaint for lack of jurisdiction (R. 20-24). The trial court overruled it, saying in part (R. 31):

> "The controversy between the parties hereinbefore set out involves the *interpretation of the effect of* Section 5 (11) of the Interstate Commerce Act (49 U.S.C., Sec. 5 (11)) *upon the order* of the Interstate Commerce Commission approving the merger, which included *as a part thereof*, a stipulation entered into by the parties herein for the protection of employees as contemplated by Section 5 (2)(f) of the Act."[7]

The allegations of the complaint and the several kinds of relief sought were sufficiently general to permit respondent to advance different and inconsistent contentions regarding its interpretation of the Interstate Commerce Act. Thus respondent argued, first, that Section 5 (11), automatically and as a matter of

[7] Emphasis is supplied in this petition unless otherwise noted.

law, rendered the Railway Labor Act "inapplicable" and relieved the respondent of its obligations of collective bargaining agreements negotiated thereunder. The same argument was made by respondent in the Court of Appeals. The first black face heading of respondent's printed brief in the Court of Appeals, followed by some 23 pages of argument, reads:

> "In accordance with the provisions of Section 5 (11) of the Interstate Commerce Act, the proposed consolidation of North Western's Marshalltown yards may be carried into effect free from any restraints, limitations or prohibitions of the Railway Labor Act, or contracts entered into thereunder."

The objective of the argument was that the trial court should adjudicate the effect of Section 5 (11) on respondent's obligations relating to contractual seniority rights and enter a declaratory judgment relieving respondent of such obligations. Accordingly, respondent did not seek arbitration of the dispute whether the Washington Agreement modified the seniority provisions of other collective agreements and, as alleged in the complaint, proposed to confine arbitration to the "task" of determining "an equitable formula for assigning the remaining positions in the coordinated operations * * *" (R. 10).

The alternative argument advanced by respondent was that Sections 5 (2)(f) and 5 (11) of the Interstate Commerce Act conferred power on the Interstate Commerce Commission to relieve respondent of its obligations as to the seniority rights of its employees and to impose compulsory arbitration of new assignments. Respondent urged that the court should read Section 5 of the Washington Agreement as though it

was a part of the order issued by the Commission, and should then judicially interpret the "order" as nullifying seniority rights by Commission "directive". Under its alternative theory, the respondent again did not propose to arbitrate the issue of whether seniority rights were modified by the Washington Agreement and, on the contrary treated such contractual rights as having been abrogated by the Commission "order", leaving only the reassignment formula for arbitration.

The District Court, following a trial in which substantially all evidence was documentary, entered a "Memorandum of Decision and Order for Judgment" granting the relief prayed in the Complaint (R. 331-346). The Court found and concluded that: (1) North Western was relieved from the requirements of the Railway Labor Act by Section 5(11) of the Interstate Commerce Act (R. 341); (2) that contractual seniority rights must yield to the "plenary and exclusive authority" of the Interstate Commerce Commission, and that the Commission had power to impose conditions "in conflict with existing collective bargaining contracts establishing seniority rights" (R. 340, 341); (3) that petitioners agreed by stipulation "as a part of the merger to submit the problem of displacement or rearrangement of employees to eventual compulsory arbitration" (R. 342); and (4) that the stipulation of the parties for protection of employees had been "approved" and "authorized by the Interstate Commerce Commission in its order approving the merger under the provisions of Section 5(2)(f), and Section 5(11) of the Interstate Commerce Act" and had been incorporated in the order "as a part thereof" (R. 338, 339, 342).

The District Court concluded that (R. 342):

> "The problem is not one of interpretation of collective agreements, but as heretofore set out, primarily involves the interpretation and effect of Section 5(11) of the Interstate Commerce Act on an agreement for the protection of employees approved by the Interstate Commerce Commission under Section 5(2) of the Act".

The judgment entered by the District Court declared the Railway Labor Act "inapplicable to the proposed coordination of plaintiff's Marshalltown railroad yards" and directed that the parties "follow the procedures prescribed in the stipulation entered into on August 4, 1960 and filed in Finance Docket No. 21115 before the Interstate Commerce Commission" (R. 343).

Petitioners filed a motion for new trial challenging the material conclusions of the court and its judgment (R. 346-347). At the hearing on this motion petitioners called attention to the fact that while the court had in effect ordered specific performance of the arbitration provisions of the stipulation it was uncertain, in view of the findings, conclusions and decree, what issues remained for arbitration, if any. (R. 348-351). The court denied the motion for new trial without opinion and without revision or clarification of its decree (R. 351).

The Court of Appeals for the Eighth Circuit, in affirming the judgment, held that the controversy involved the Commission's "right" to make employee protective provisions "in conflict with existing collective bargaining agreements and the prescribed procedures set forth in the Railway Labor Act" (Appen-

dix, p. 20a). It stated that "the basic issue" is (Appendix, p. 24a):

> "* * * whether the statutory authority conferred upon the ICC by the Interstate Commerce Act to approve and facilitate mergers of carriers includes the power to authorize changes in working conditions necessary to effectuate such mergers."

In answering this question in the affirmative, the Court of Appeals interpreted the decision of this court in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, as indicating that (Appendix, p. 28a):

> "* * * the ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist."

The Court of Appeals further held that "the Railway Labor Act, if it applied, would threaten to prevent many consolidations" (Appendix p. 28a); that the provisions relating to mergers "take precedence over the provisions of the Railway Labor Act" (Appendix p. 29a); and that (Appendix pp. 29a-30a):

> "* * * Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers."

The Court of Appeals also held that the ICC had frequently provided for "compulsory arbitration" to settle "labor disputes" arising out of "mergers", and concluded that the District Court (Appendix, p. 34a):

> "* * * committed no error in holding that the Commission acted within its jurisdiction in pro-

viding for the adjustment of *labor disputes* arising out of the approved merger; and that the court correctly decided that the parties to the action should follow the procedures prescribed by the stipulation approved and adopted by the Commission."

Petitioners filed a timely petition for a rehearing in the Court of Appeals which it denied without opinion. (Appendix p. 34a(2)).

## REASONS FOR GRANTING THE WRIT

### The Judgment of the Courts Below Decides Important Questions of Federal Law Involving the Interpretation and Administration of the Railway Labor Act and the Interstate Commerce Act.

It would be impossible to overstate the profound impact on labor relations in the railroad industry if the judgment below is permitted to stand. The revolutionary interpretations placed on the Railway Labor Act and the Interstate Commerce Act, combined with the misconceptions of settled administrative and judicial construction of these statutes will create confusion and unrest in railway labor relations for years to come.

The decision below, in holding that the Interstate Commerce Commission is empowered to deal with "labor disputes" arising out of or following Section 5(2) transactions, overturned the settled administrative interpretation and practice of the Interstate Commerce Commission to the contrary. In 1958 the Commission rejected substantially the same contentions now made by this respondent in a proceeding before the Commission involving the respondent's lease of the Chicago, Saint Paul, Minneapolis and Omaha Railway

Company. The decision of the Commission in that proceeding is reported in 295 I.C.C. 696, and is reproduced in full in the Appendix to this petition at page 39a *et seq.*

In *City of Nashville, Tennessee* v. *United States*, 155 F. Supp. 98, affirmed in 355 U.S. 63, a three-judge court also recorded the Commission's views, as expressed by its counsel, in finding of Fact No. 15 which reads in part as follows:

> "Toward the conclusion of a lengthy colloquy concerning the protection of rights of the Nashville, Chattanooga & St. Louis Railway employees, counsel for the Interstate Commerce Commission, Robert W. Ginnane, Esquire, made the statement that the Commission is *without power*, in connection with a reorganization to *tell carriers who shall or shall not be laid off as a result of the merger*. He stated further that the Commission's power and responsibility are limited to specifying protection of those who are laid off, the choice of those laid off being left to the managerial discretion of the carriers *as limited by their collective bargaining agreements*."

The Court of Appeals sought administrative support for its conclusions by the assertion that (Appendix p. 32):

> "The ICC has many times provided for compulsory arbitration to settle *labor disputes* arising out of mergers where the parties have been unable to agree. See *Arnold* v. *Louisville & Nashville R.R.*, D.C. M.D. Tenn., 180 F. Supp. 429, 435-36."

This statement and the citation of the *Arnold* case as authority for it evidences the deep confusion of the court. In *Arnold* (affirmed in *Batts* v. *Louisville & Nashville Railroad Co.*, 6 Cir., 316 F. 2d 22), the

court was dealing with and had reference only to arbitration of individual claims for protective benefits and did not have before it a railway labor dispute governed by the Railway Labor Act.

The arbitration orders entered by the Commission, as a part of the protective conditions imposed on carriers in merger transactions, are confined to arbitration of the claims of individual employees to protective benefits. Such conditions in protective orders are made by the Commission to avoid forcing individual claimants to the expense of suits in court to establish their claims. *New Orleans & Northeastern R.R.* v. *Bozeman*, 5 Cir., 312 F. 2d 264; *Arnold* v. *Louisville & Nashville R.R.*, 180 F. Supp. 429, and *Louisville & Nashville Railroad* v. *Cantrell*, 44 L.C. Par. 17, 370, both affirmed in *Batts* v. *Louisville and Nashville Railroad Company*, 6 Cir., 316 F. 2d 22; *City of Nashville, Tennessee* v. *United States*, 155 F. Supp. 98, affirmed in 355 U.S. 63.

The distinction emphasized by the foregoing authorities is illustrated by comparing the decision of the Fifth Circuit in *New Orleans & Northeastern R.R.* v. *Bozeman*, 5 Cir., 312 F. 2d 264, decided January 12, 1963, with its earlier decision of July 6, 1962, in *Texas & N. O. R.* v. *Brotherhood of Railroad Trainmen*, 5 Cir., 307 F. 2d 151, certiorari denied January 7, 1963, in 371 U.S. 952. The *Bozeman* case involved claims of individual employees for benefits provided by an order of the Interstate Commerce Commission. The *Texas* case involved a railway labor dispute arising by reason of Commission approval of a Section 5(2) transaction. Many of the same contentions regarding interpretation of the Interstate Commerce Act which are advanced here by North Western were advanced to

and rejected by the Fifth Circuit in its decision in the *Texas* case. It may be that the facts involved in *Texas* are so different as to prevent the assertion of direct conflict between that decision and the decision of the Eighth Circuit to which this petition is filed. Nevertheless, it is clear that in rejecting *Texas* and in relying on *Bozeman* the Eighth Circuit evidenced a complete misunderstanding of both decisions.

It does not require extended discussion to indicate the confusion of equating compulsory arbitration of "protective benefits" by individual claimants with compulsory arbitration of "labor disputes" involving collective bargaining representatives of railway crafts and their contracts governing seniority and other working conditions. This confusion pervades the interpretation placed on the Interstate Commerce Act by the courts below. Such an interpretation attributes to Congress an intent to discard seventy-five years of elaborate and specialized railway labor legislation, and of replacing it by only three sentences in Section 5(2)(f) and one phrase in Section 5(11) of the Interstate Commerce Act. Congress is said to have thereby intended to transfer to the Interstate Commerce Commission power to deal with railway labor disputes in its uncontrolled discretion and with peremptory and unlimited authority.

The result of such confusion can be nothing short of chaos. The Interstate Commerce Commission would embark on an uncharted sea in which it has no specialized competence, no statutory direction, and no administrative organization. This radical departure in the handling of railway labor relations by construction of an Act not designed by Congress to provide procedures for dealing with railway labor disputes should

not, we submit, be permitted to continue in force. It will inevitably generate many new and serious problems.

It is respectfully submitted that the suggestion that Congress enacted the elaborate legislation of the Railway Labor Act for dealing with railway labor disputes only to reject it with respect to Section 5(2) transactions under the Interstate Commerce Act, by tersely labeling it a "restraint, limitation or prohibition", ascribes to Congress an incredible contradiction in legislative policy which is said to have been expressed in an incongruous choice of language. We submit that such a construction, by reason of the problems presented by it, warrants the consideration of this court.

Whatever may be argued concerning the applicability of Section 5(11) to the Railway Labor Act finds even less support when that provision of the Interstate Commerce Act is applied, as it was by the courts below, so as to relieve rail carriers of the obligations of collective bargaining agreements. On its face, the language "restraints, limitations or prohibitions *of law*" appears completely irrelevant to restraints or limitations imposed by contracts. Yet the lower courts predicate their conclusion that such restraints and limitations are nullified solely on Section 5(11). It is submitted that the authorities cited by the courts below do not support this conclusion.

**The Judgment of the Court Below Is in Conflict With Applicable Decisions of This Court.**

In a number of decisions this court has held that controversies concerning the interpretation or application of railway collective bargaining agreements are not justiciable and must be left for solution by the

administrative procedures provided in the Railway Labor Act. *General Committee etc.* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338; *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239; *Order of Railway Conductors* v. *Southern Railway*, 339 U.S. 255; *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561; and see *Brotherhood of L. E.* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528.

The Washington Agreement of 1936 is a railway collective bargaining agreement. *Railway Labor Executives Association* v. *United States*, 339 U.S. 142, 147; *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 337-339. It is submitted that in interpreting and applying the agreement and in adjudicating the controversy between the parties as to its meaning and effect both courts acted in direct disobedience to the decision of this court.

Whether a railway labor agreement may be judicially enforced by an order entered for specific performance of its provisions for voluntary arbitration is believed to present a question of first impression. Section 301 of the Labor Management Relations Act (29 U.S.C., Section 185) is not applicable to railway labor collective agreements by definition and by exemption. 29 U.S.C., Sections 141, 142, 152, 182, 185;

---

[*] In construing Section 5 of the Washington Agreement as an "implicit" modification of seniority rights defined in other collective agreements the courts below disregarded any inconsistency of their interpretation as against similar terminology in Section 12, the specific recognition in other paragraphs of the "normal exercise of seniority" as provided by "existing agreements", and limitations of arbitration to the "protection" provided by the Agreement (R. 208, 210, 213, 214, 217, 281-283). These were issues to be submitted to the National Railroad Adjustment Board and were not for judicial consideration and determination.

*Local Union No. 25 v. New York, N.H. & H.R. Co.*, 350 U.S. 155; *California v. Taylor*, 353 U.S. 553. In purporting to order specific performance of a voluntary railway labor arbitration agreement the courts below acted without statutory authority and in conflict with applicable and governing decisions of this court interpreting the Railway Labor Act.

Irrespective of the question whether the dispute concerning the interpretation and application of the Washington Agreement should be determined by the National Railroad Adjustment Board as opposed to an arbitrator, at least in the first instance, the lower courts also were seriously in error in adjudicating some of the issues in dispute and relegating others to arbitration. If it were to be assumed, arguendo, that federal courts have authority to order specific performance of railway collective bargaining agreements for voluntary arbitration, it is submitted that the entire dispute necessarily must be submitted to the arbitrator for decision, unprejudiced either by adjudication of part of it or even by expression of judicial dicta as to its merit.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 187

Office-Supreme Court, U.S.
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JUN 5 1963
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association; G. W. MINSON, individually and as Secretary, General Committee of Adjustment, Chicago and North Western Railway Company, and Local Chairman of said Association; A. O. BEST, individually and as Local Chairman of said Association; HOWARD R. GILLETTE, individually and as Local Chairman of said Association; R. B. SEGER, individually and as Secretary and Local Chairman of said Association; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association; W. I. CARREL, individually and as Vice-Chairman of said Association; K. O. WHITE, individually and as Local Chairman of said Association; VAUGHN R. WARD, individually and as General Chairman of said Association; E. H. DONNELLY, individually and as Vice Chairman of said Association; J. R. MAYER, individually and as Local Chairman of said Association; BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association; W. A. BURKE, individually and as Vice Chairman and Local Chairman of said Association; T. A. MILLER, individually and as Local Chairman of said Association; E. STOUVENEL, individually and as Local Chairman of said Association; M. VITIRITTO, individually and as Local Chairman of said Association; R. W. STANLEY, individually and as General Chairman of said Association; H. L. HEMPHILL, individually and as Local Chairman of said Association; SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association; E. H. KANE, individually and as General Chairman of said association; E. K. BRAINERD, individually and as Local Chairman of said Association, *Petitioners*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A Corporation, *Respondent*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## Memorandum of Decision and Order for Judgment

(Filed February 2, 1962, in the United States District Court for the Southern District of Iowa)

STEPHENSON, Chief Judge.

Plaintiff, Chicago and North Western Railway Company (North Western), brought this action against defendants, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, AFL-CIO, all unincorporated associations, and various officials of each of said associations as officials of said associations and individually. Plaintiff seeks declaratory judgment as authorized by Title 28, U. S. C., Sec. 2201 and Sec. 2202, declaring the rights of the parties with respect to a controversy which has arisen regarding the lawful procedures to be followed in the coordination and consolidation of plaintiff's existing and newly acquired railroad yards in Marshalltown, Iowa.

In brief, plaintiff contends that the procedures governing personnel changes contemplated in the consolidation of railroad yards at Marshalltown, Iowa are prescribed in a stipulation executed by the North Western and the defendants and authorized by the Interstate Commerce Commission as a part of its order approving plaintiff's acquisition of the properties and franchises of the Minneapolis & St. Louis Railway Company (M. & St. L.) Defendants contend the personnel changes contemplated involve seniority rights and other changes in rules that are contractual rights which can only be changed under procedures prescribed by the Railway Labor Act (45 U. S. C., Sec. 151, et seq.).

North Western is a common carrier by railroad engaged in interstate commerce, and as such is subject to the provisions of the Interstate Commerce Act. Defendant as-

sociations are labor organizations, national in scope, each of which serves as the collective bargaining representative for certain of North Western's employees who may be effected by the proposed unification of North Western's old and newly acquired (M. & St. L.) railroad yards in Marshalltown, Iowa. Individual defendants named in plaintiff's complaint are various officers, representatives or agents of defendant organizations, whose duties relate to the representation of North Western employees, including those of the former M. & St. L.

The Interstate Commerce Commission pursuant to its authority under Section 5 of the Interstate Commerce Act (49 U. S. C., Sec. 5) approved and authorized the purchase by North Western of the properties and franchises of the M. & St. L. (hereinafter referred to as the Merger) by formal order entered on October 13, 1960.[1] Pursuant to said order North Western acquired all of the railroad properties of M. & St. L., and effective November 1, 1960, said M. & St. L. ceased to exist as a common carrier.

Section 5 (2) (f) of the Interstate Commerce Act (49 U. S. C. 5 (2) (f)) provides that in its approval of any unification transaction under said section "the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." In accordance with this obligation the Commission found as follows:

> "Applicants also entered into a stipulation[2] with railway labor organizations represented by the Railway Labor Executives' Association for the protection of all employees of the applicants whose bargaining representatives are members of the association. The stipulation is of the character contemplated by section 5 (2) (f) of the act for the protection of railway em-

[1] Interstate Commerce Commission Finance Docket 21115.

[2] Filed with the Commission in Finance Docket 21115.

ployees who may be adversely affected by the transaction authorized. As to the employees covered by the stipulation, no conditions in our order are necessary. As to employees of the applicants not covered by the aforesaid stipulation, we will prescribe for their protection conditions similar to those set forth in Oklahoma Ry. Co. Trustees Abandonment, 257 I. C. C. 177."[3]

The stipulation (hereinafter referred to as the "stipulation") was executed by North Western, M. & St. L. and by the Railway Labor Executives' Association, acting as the duly designated representatives of the four defendant labor organizations, as well as others. The "stipulation" provides:[3a]

"That in the event the Interstate Commerce Commission shall grant the authority requested in Finance Docket No. 21115, the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employes as provided in Section 5 (2) (f) of the Interstate Commerce Act, as amended."

The "stipulation" also provided:

"It is mutually agreed as follows:

That the Agreement of May, 1936, Washington, D. C., commonly referred to as the Washington Job Protection Agreement, is hereby adopted and shall be applied for the protection of employees of the above-named carriers who may be adversely affected by Interstate Commerce Commission approval of the applications or petitions in the proceedings designated as Finance Docket No. 21115, the primary object of which is the merger of the carriers named above with the following modifications: * * * "

[3] It is agreed that employees involved herein are covered by the stipulation."

[3a] Excerpts from the "stipulation" indicating the type of protection afforded employees are set out in the appendix.

Pertinent portions of the Washington Job Protection Agreement as incorporated in the "stipulation" provide as follows:

> "Section 1. That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad industry solely due to and resulting from such coordination. * * *"
>
> "Section 2. (a) The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."
>
> "Section 3. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

The "stipulation" further provides:

> "2. Section 13 is deleted and the following inserted in lieu thereof:
>
> In the event any dispute or controversy arises (including disputes described in Section 3 but excepting those defined in Section 11) with respect to the protection afforded by this agreement, including an interpretation, application or enforcement of any of its provisions, which cannot be settled by the carrier

or carriers and the employe, or his authorized representative, within 30 days after the dispute arises, it may be referred by either party to an arbitration committee, for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen, shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, either party may request the National Mediation Board to appoint the third member. The decision of the majority of the arbitration committee shall be final and conclusive."

Prior to November 1, 1960, each company, by virtue of its separate identity, conducted its own switching operations at Marshalltown, Iowa over and in its own separate yard tracks and facilities.

North Western handled its switching in its Marshalltown yard through a single yard engine assigned to one 8-hour shift 5 days each week. Plaintiff's employees at this yard consisted of the following classes and numbers: One engineer, represented for collective bargaining purposes by the Brotherhood of Locomotive Engineers; one fireman, represented by the Brotherhood of Locomotive Firemen and Enginemen; one yard foreman and two yard helpers, each represented by the Brotherhood of Railroad Trainmen. The engineer and fireman held seniority in their respective crafts over the east subdivision of plaintiff's Iowa Division, which included its Marshalltown yards. The yard foreman and helpers held seniority in their respective crafts in all of plaintiff's yards on its Iowa Division.

M&StL handled its larger Marshalltown yard switching operations through the assignment of yard engines covering two 8-hour shifts, one shift covering 6 days, and the other 7 days, each week. The following classes and number of employees were assigned to each shift: One engineer, represented for collective bargaining purposes by the Brotherhood of Locomotive Engineers; one fireman, represented by the Brotherhood of Locomotive Firemen and Enginemen; and one yard foreman and two yard helpers, represented by the Switchmen's Union of North America, AFL-CIO. Each of the engineers and firemen held seniority in their respective crafts on all M&StL lines of railroad south of Albert Lea, Minnesota to Peoria, Illinois. Seniority of the yard foreman and helpers was limited to the Marshalltown yards. In addition to these employees, there was also assigned to a single 8-hour shift, 6 days each week, a yardmaster, represented by the Railroad Yardmasters of America, a labor organization not involved in this controversy.

Section 4 of the Washington Job Protection Agreement as incorporated in the "stipulation" prescribed the notice requirements in the case of each proposed coordination. By the posting of notice thereunder dated December 16, 1960, North Western advised all employees who might be affected "that the C&NW contemplates coordinating yard operations at Marshalltown * * * effective not earlier than March 17, 1961." It was further advised that it was contemplated that all Marshalltown yard operations would be placed under the jurisdiction of the M&StL Division superintendent and that, in effect, yard assignments would include the entire combined yards without being limited to one or the other of the separate yards belonging to either North Western or M&StL prior to the purchase transaction. The notice also stated that "* * * it was contemplated that the coordination will result in the abolish-

ment of 1 yard engine assignment (1 engineer, 1 fireman, 1 foreman and 2 helper assignments)." By letter of December 13, 1960 to the representatives of the employees involved, to which letter was also attached a copy of the notice to be posted on December 16th, North Western requested a conference on the proposed coordination in accordance with said Section 4.

Following the service of this notice a controversy developed between the North Western and the defendants as to the manner of processing the proposed coordination. The defendants insisted that North Western's notice of the proposed coordination consisted of a Section Six Notice under the Railway Labor Act (Title 45 U. S. C., Sec. 156),[1] or that the notice was a violation of the Railway Labor Act. North Western denied it had submitted a Section Six Notice and insisted that the proposed coordination be processed under the provisions of the "stipulation" (Washington Job Protection Agreement, as amended) entered into by the parties and authorized by

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[1] Title 45 U.S.C., Sec. 156, is as follows: "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

the order of the Interstate Commerce Commission approving the merger. A conference was held on January 12, 1961 at which time the position of each of the parties remained unchanged. Thereafter North Western notified the defendants of its intent to submit the dispute to arbitration under the terms of the "stipulation"[5] and on April 5, 1961 notified defendants of the identity of the arbitrator designated by North Western. On April 7, 1961 North Western received a telegram from the National Mediation Board warning it of a threatened strike by North Western's employees represented by defendants, Brotherhood of Locomotive Firemen and Enginemen, and Brotherhood of Railroad Trainmen. Thereafter North Western requested that the National Mediation Board designate a neutral arbitrator, as provided for in the "stipulation". On May 18, 1961 a conference was held at the request of the National Mediation Board which was not productive.

As a result of this dispute North Western's yards at Marshalltown are conducted as separate operations with the same arrangement of labor forces that existed before the Merger. On July 14, 1961 North Western brought this action for declaratory judgment in which it seeks a declaration of the rights of the parties with respect to the foregoing controversy over the lawful procedures to be followed in the coordination and consolidation of its railroad yards in Marshalltown, Iowa.

The controversy between the parties hereinbefore set out involves the interpretation of the effect of Section 5 (11) of the Interstate Commerce Act (49 U. S. C., Sec. 5 (11)) upon the order of the Interstate Commerce Commission approving the Merger, which includes as a part thereof the stipulation entered into by the parties herein

[5] Supra, page 5 (R. 335).

for the protection of employees as contemplated by Section 5 (2) (f) of the Act (49 U. S. C. 5 (2) (f).) Jurisdiction of the matter now before the court is conferred by Title 28 U. S. C., Sec. 1337. Such being the case, diversity of citizenship and jurisdictional amount are not essential. *Mulford v. Smith*, 307 U.S. 38, 46.

Defendants originally in a motion to dismiss herein, objected to venue on the grounds that since they are unincorporated associations, venue may be laid against them under Title 28, U. S. C., Section 1391 (b), only in the judicial district where they all "reside," and that the place of such residence is the place where their principal office and place of business is located, which is concededly in Cleveland, Ohio and Buffalo, New York. This court overruled defendants' contention in this regard, citing *American Airlines, Inc., v. Airline Pilot's Ass'n, Inc.*, 169 F. Supp. 777 (S. D. N. Y. 1958). Thereafter the plaintiff herein amended its complaint to remove its prayer for damages and the defendants withdrew their objection to venue.

An actual controversy exists between the parties and the request for declaratory judgment declaring the rights of the parties herein should be granted. (28 U. S. C., Sec. 2201.)

The basic question presented herein is, whether the parties are required to follow the procedures of the Railway Labor Act (45 U. S. C., Sec. 151, et seq.), in effecting the proposed co-ordination of North Western's railroad yards at Marshalltown, Iowa, or whether the parties are required to follow the procedures prescribed by the "stipulation" entered into by the parties and authorized by the Interstate Commerce Commission in its order approving the merger under the provision of Section 5 (2) (f) and Section 5 (11) of the Interstate Commerce Act, 49 U.S.C., Sec. 5 (2) (f), 5 (11).

*District Court Decision*

North Western contends that under the provisions of Section 5 (11)* of the Interstate Commerce Act (49 U. S. C., Sec. 5 (11) the merger, approved by the Interstate Commerce Commission pursuant to Section 5 (2) of the same act (49 U. S. C., Sec. 5 (2)), may be carried into effect free from any restraints and limitations of the Railway Labor Act and contracts entered into thereunder. Defendants contend that provisions of the Railway Labor Act are not a "restraint" or a "limitation" or a "prohibition" within the purview of Sec. 5 (11) of the Interstate Commerce Act; further that Section 5 (11) only purports to relieve the railroad of "restraints" or "limitations" or "prohibitions" of law and does not purport to relieve the railroad of its contractual obligations; and finally that the merger which the Commission approved was permissive only, that it did not direct the North Western, nor

* 49 U. S. C., Sec. 5(11), is as follows: The authority conferred by this section shall be *exclusive and plenary*, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power • • • to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority, and any carriers or other corporations, and their officers and employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and *they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved* or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. (Emphasis added)

did it direct the employees or their representatives to do anything.

It is conceded that North Western's proposed unification of the railroad yards at Marshalltown involves seniority rights. Seniority rights arise and exist by virtue of collective bargaining agreements. *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 526 (1949); *Starke* v. *New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569 (7 Cir. 1950); *Logan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465 (D. C. Penn. 1959). In the railroad industry such seniority rights are confined to specified divisions of the railroad and employees on one division do not hold seniority on other divisions. *See, Gaskill* v. *Roth*, 151 F. 2d 366 (8 Cir. 1945).

It has been held that contractual rights granted preferred stockholders under State law must yield to the plenary and exclusive authority of the Interstate Commerce Commission to approve a merger agreement under the Interstate Commerce Act. (49 U. S. C. Sec. 5, Sec. 20a.) *Schaefbacher* v. *United States*, 334 U. S. 182 (1947). The controlling consideration in approving mergers and consolidations is the public interest and the Commission may authorize a carrier to abandon facilities within a State even though the State laws prohibit the same. *Texas* v. *United States*, 292 U. S. 522 (1934). It is abundantly clear that under Section 5 (11) (49 U. S. C., Sec. 5 (11)) the Commission has the power to exempt railroads from the operation of State laws under a Section 5 proceeding. *Seaboard R. Co.* v. *Daniel*, 333 U. S. 118 (1948).

It has also been held that the Civil Aeronautics Board under Federal legislation authorizing it to approve mergers (49 U. S. C., Sec. 488) may, as a part of said approval, impose conditions which conflict with an existing collective bargaining contract establishing seniority rights. In

*Kent v. Civil Aeronautics Board*, 204 F. 2d 263, 266 (2 Cir. 1953), cert. den. 346 U. S. 826, the court said:

> "A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest."

Defendants contend that the authority of the Commission to approve mergers under the law (49 U. S. C., Sec. 5) is permissive only and its grant of permission has no effect on contractual rights and obligations. *St. Joe Paper Co. v. Atl. Coast Line R. Co.*, 347 U. S. 299 (1954); *Regents of the University System of Georgia v. Carroll*, 338 U. S. 587 (1950). Defendants further contend that in any event the proposed consolidation involved changes in contracts which could only be brought about under the procedures of the Railway Labor Act (45 U. S. C. 151 et seq.). *Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330 (1959); *City of Nashville, Tennessee, v. United States*, 155 F. Supp. 98, Aff. in 355 U. S. 63 (1957).

It is the view of the court that under the circumstances of this case the parties hereto in carrying out the consolidation of yards are relieved from the requirements of the Railway Labor Act by virtue of Section 5 (11) of the Interstate Commerce Act (49 U. S. C., Sec. 5 (11)). To hold otherwise would do violence to a plain reading of the statute. The parties entered into a stipulation pertaining to the protection of the interests of the employees of the merging railroads which the Commission found "is of the character contemplated by Section 5 (2) (f) of the Act for the protection of railway employees who may be adversely affected by the transaction authorized."[1] To now require the North Western to comply with the provisions

[1] Supra, page 4 (R. 333)

of the Railway Labor Act is to deprive it of the benefits of compulsory arbitration agreed to by the parties in the "stipulation". While the Railway Labor Act provides for negotiations, it does not compel agreement. *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western R. Co.*, 321 U. S. 50 (1944). Under defendants' contentions they may veto the economies proposed by North Western in the merger plan even though the defendants agreed by stipulation as part of the merger to submit the problem of displacement or rearrangement of employees to eventual compulsory arbitration. Defendants' contention that "Section 5 (11) is obviously designed solely for the purpose of authorizing one railroad to acquire another free of prohibitions of state law or Federal anti-trust statutes which otherwise might prohibit or make illegal such an acquisition." cannot be sustained. No such limitation can be found in the words of the statute.

Defendants further contend that there is no judicial authority to interpret and apply collective agreements negotiated between railroads and their employees. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950); *Order of Railway Conductors* v. *Southern Railway*, 339 U. S. 255 (1950). That this court, therefore, is without authority to interpret or apply any of the agreements before it, including the "stipulation," which incorporates the Washington Job Protection Agreement. Defendants' contention in this regard ignores the gist of the controversy herein. The problem is not one of interpretation of collective agreements, but as hereofore set out, primarily involves the interpretation and effect of Section 5 (11) of the Interstate Commerce Act on an agreement for the protection of employees approved by the Interstate Commerce Commission under Section 5 (2) of the Act.

The foregoing shall constitute the court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

**Order**

It is Therefore Ordered, Adjudged and Decreed as follows:

1. That the Railway Labor Act (49 U. S. C. 151 et. seq.) is inapplicable to the proposed coordination of plaintiff's Marshalltown railroad yards.

2. The parties hereto in carrying out the proposed coordination are required to follow the procedures prescribed by the stipulation entered into on August 4, 1960 and filed in Finance Docket No. 21115 before the Interstate Commerce Commission.

ROY L. STEPHENSON,
United States District Judge.

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**Appendix**

Section 6 (a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated

for the purposes of this section as occupying the position which he elects to decline.

(b) * * *

(c) * * *

Section 7. Section 7 (a); that portion of Section 7 (d) specifying a three-year period and Section 7 (i) are deleted and the following inserted in their stead:

A. If as a result of the merger (hereinafter referred to as the coordination), any employe, hereinafter referred to as a dismissed employe, of the carriers is deprived of employment with said carriers, he shall be accorded a monthly coordination allowance equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the coordination. This allowance shall be made during the protective period to each dismissed employe while unemployed.

B. The coordination allowance of any dismissed employe shall be reduced by the amount of his combined monthly earnings in other employment, plus any benefits received under any unemployment insurance law. Such employe, or his representative, and the carriers, should agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employe in employment other than with the carriers, and the benefits received.

C. The period during which this protection is to be given, herein called the protective period, shall extend from the date on which the employe is dismissed to the expiration of 4 years from the effective date of the coordination: provided, that such protection shall not continue for a longer period following the effective date of the coordination than the period during which

such employe was in the employ of the carriers prior to the effective date of the coordination.

D. * * *

(b) * * *

(c) * * *

(d) * * *

(e) * * *

(f) * * *

(g) * * *

(h) * * *

(j) * * *

Section 8. * * *

Section 9. - Any employee eligible to receive a coordination allowance under section 7 hereof may, at his option at the time of coordination, resign and (in lieu of all other benefits and protections provided in this agreement) accept in a lump sum a separation allowance determined in accordance with the following schedule:

| Length of Service | Separation Allowance |
|---|---|
| 1 year & less than 2 years | 3 months' pay |
| 2 years " " 3 " | 6 " " |
| 3 " " " 5 " | 9 " " |
| 5 " " " 10 " | 12 " " |
| 10 " " " 15 " | 12 " " |
| 15 years and over | 12 " " |

In the case of employees with less than one year's service, five days' pay, at the rate of the position last occupied, for each month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in Section 7.

(b) One month's pay shall be computed by multiplying by 30 the daily rate of pay received by the employee in the position last occupied prior to time of coordination.

Section 10 (a). Any employee who is retained in the service of any carrier involved in a particular coordination (or who is later restored to service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as result of such coordination and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter (not to exceed two working days) used in securing a place of residence in his new location. . . .

## Opinion of the United States Court of Appeals for the Eighth Circuit

[March 7, 1963]

Before SANBORN, VAN OOSTERHOUT and MATTHES, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff Chicago and North Western Railway Company (North Western) brought this action against the defendant labor organizations and officers thereof for declaratory judgment as authorized by 28 U.S.C.A. §§ 2201-2202, to determine the rights of the parties with respect to the lawful procedures to be followed in adjusting seniority rights of employees affected by the consolidation of plaintiff's railroad yard with the newly acquired Minneapolis & St. Louis Railway Company (M. & St. L.) yard at Marshalltown, Iowa.

North Western and M. & St.L. are common carriers by railroad engaged in interstate commerce and are subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. §§ 1 et seq., as well as the Railway Labor Act, 45 U.S.C.A. §§ 151 et seq. It is conceded that each of the railway employees affected by the consolidation is represented by a defendant labor organization. Railway Labor Executives' Association (RLEA) is the duly authorized representative of the defendant labor organizations.

Jurisdiction as asserted by reason of 28 U.S.C.A. § 1337 was challenged and upheld by the trial court. The issue presented is thus stated by the trial court:

> "The basic question presented herein is, whether the parties are required to follow the procedures of the Railway Labor Act (45 U.S.C.A. § 151 et seq.) in effecting the proposed coordination of North Western's railroad yards at Marshalltown, Iowa, or whether the parties are required to follow the procedures prescribed by the 'stipulation' entered into by the par-

ties and authorized by the Interstate Commerce Commission in its order approving the merger under the provisions of Section 5(2)(f) and Section 5(11) of the Interstate Commerce Act, 49 U.S.C.A. § 5(2) (f), 5(11)."

The trial court thus resolved such issue:

"1. That the Railway Labor Act (45 U.S.C.A. § 151 et seq.) is inapplicable to the proposed coordination of plaintiff's Marshalltown railroad yards.

"2. The parties hereto in carrying out the proposed coordination are required to follow the procedures prescribed by the stipulation entered into on August 4, 1960 and filed in Finance Docket No. 21115 before the Interstate Commerce Commission."

The trial court's well-considered opinion, setting out the pertinent facts and applicable law is reported at 202 F. Supp. 277.

Defendants as a basis for reversal urge:

"I. The District Court erred in holding that it had jurisdiction of the controversy under Section 1337 of Title 28, U.S.C.

"II. The District Court should have dismissed the action as involving an abstract question.

"III. The Court erred in its ruling and judgment as to jurisdiction and as to the merits of the controversy."

As a background for the consideration of the errors asserted, we will set out some of the pertinent facts. There is no dispute between the parties as to the basic facts. On October 13, 1960, by order entered in Finance Docket No. 21115, the Interstate Commerce Commission (ICC), acting under § 5(2) of the Interstate Commerce Act, after considering appropriate applications on file and after due notice and hearing, entered an order authorizing

North Western to acquire by purchase the railroad properties and operating rights of M. & St.L. The purchase authorized was consummated. North Western took over the operation of M. & St.L. on November 1, 1960.

The present controversy arising out of the aforesaid merger proceedings relates to the provision made for the protection of the employees and to the Commission's right to make such provisions which conflict with existing collective bargaining agreements and the prescribed procedures set forth in the Railway Labor Act. The ICC report reads in part:

> "Applicants also entered into a stipulation with railway labor organizations represented by the Railway Labor Executives' Association for the protection of all employees of the applicants whose bargaining representatives are members of the association. The stipulation is of the character contemplated by section 5 (2) (f) of the act for the protection of railway employees who may be adversely affected by the transaction authorized. As to the employees covered by the stipulation, no conditions in our order are necessary."

The stipulation referred to in the report and order was made between North Western and M. & St.L. and RLEA, the authorized representative of the employees. Material portions of the Stipulation are set out at pages 280, 284, 285 and 286 of 202 F. Supp. The stipulation followed generally the pattern of the Washington Job Protection Agreement of 1936,[1] with some modifications.

[1] The Washington Job Protection Agreement is an industry-wide collective bargaining agreement entered into by most railroads, including North Western and M. & St.L., and the labor organizations. It specifies conditions for the protection of employees in event of mergers. For further details as to the Washington Agreement see *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 173; *United States v. Lowden*, 308 U.S. 225, 234; *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142, 147 et seq., and the trial court's opinion.

*Court of Appeals Opinion*

The stipulation provides "the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employes as provided in Section 5 (2) (f) of the Interstate Commerce Act, as amended."

The stipulation incorporating the employees' agreement filed with the Commission states: "the protection of the interests of the employees of the carrier parties to the above-entitled proceeding has been provided by said agreement, and any report and order issued by the Commission in said proceeding approving the application may so state."

The stipulation provides the basis for determining compensation to be paid employees adversely affected by the merger. Section 5 of the Washington Agreement, incorporated in and made a part of the stipulation, reads:

> "Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto."

The stipulation further provides that in event a controversy cannot be decided as set out above, it may be referred to an arbitration committee composed of one member selected by each party and a third member to be selected by such members, or if they are unable to agree, either party may request the National Mediation Board to appoint a third member and that "the decision of the majority of the arbitration committee shall be final and conclusive."

On December 16, 1960, North Western gave notice in the manner prescribed in the stipulation that it contem-

plated coordinating its yard and the yard formerly operated by M. & St.L. at Marshalltown, Iowa, not earlier than March 17, 1961, and that such consolidation would result in the abolishment of one yard engine assignment (one engineer, one fireman, one foreman and two helper assignments). North Western also sent letters to the representatives of the yard employees requesting conferences contemplated by the stipulation for the purpose of reaching an agreement as to employees to be released and the solution of the labor problems flowing from the coordination. Numerous letters were exchanged between plaintiff and defendants wherein plaintiff contended that the controversy should be settled in the manner provided by the stipulation while defendants contended that the dispute must be handled under the provisions of § 6 of the Railway Labor Act. After it become apparent that any attempt to adjust the differences by negotiation would be futile, plaintiff invoked the arbitration provisions of the stipulation, notifying the defendants of the identity of its arbitrator, and plaintiff later requested the National Mediation Board to designate the neutral arbitrator pursuant to the stipulation provisions. Defendants, upon the basis that the Railway Labor Act controls, refused to name an arbitrator. The National Mediation Board did not act upon plaintiff's request that it appoint a neutral arbitrator.

Defendants' first point, to the effect that the court lacks jurisdiction, is without merit. The trial court states in its opinion, "The problem is not one of interpretation of collective agreements, but as heretofore set out, primarily involves the interpretation and effect of Section 5(11) of the Interstate Commerce Act on an agreement for the protection of employees approved by the Interstate Commerce Commission under Section 5(2) of the Act."

28 U.S.C.A. § 1337 confers jurisdiction upon federal courts over actions arising under any act of Congres-

regulating commerce. We agree with the contention of the parties that *Gully* v. *First National Bank*, 299 U.S. 109, prescribes the rules to be applied in determining whether an action arises under the provisions of the Interstate Commerce Act and the Railway Labor Act. *Gully* thus states the test of jurisdiction: "The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." 299 U.S., 112. The problem of statutory construction here presented is a substantial one and fully satisfies the *Gully* test.

Defendants' contentions that the action should be dismissed as presenting only an abstract question and that the court erred in ruling upon the merits present complex problems of statutory interpretation and accommodation. Such issues are closely related and will be considered together.

It is agreed that the unification of the yards at Marshalltown will affect the seniority rights of the employees who are presently assigned to those yards. Their seniority rights arise out of separate collective bargaining agreements with North Western and M. & St.L., and consequently they do not apply uniformly to both groups of employees.

Defendants appear to regard the dispute as a major dispute which must be resolved, if at all, according to the procedures set out in § 6 of the Railway Labor Act. They urge that § 2, Seventh, forbids North Western to make any consolidation which alters seniority rights except in accordance with § 6.

We do not deem it necessary to determine whether the dispute here involved is major or minor within the meaning of the Railway Labor Act. For discussion of the distinction between major and minor disputes and the avail-

able remedies, see *Elgin, J & E. Ru.* v. *Burley*, 325 U.S. 711, 722 et seq. See also *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. R.*, 7 Cir., 310 F.2d 503. If either a major or minor dispute exists here and if the Railway Labor Act applies under the present factual situation, exclusive jurisdiction for resolution of the dispute would rest in the instrumentalities established by the Railway Labor Act.

The trial court held that "under the circumstances of this case the parties hereto in carrying out the consolidation of yards are relieved from the requirements of the Railway Labor Act by virtue of Section 5(11) of the Interstate Commerce Act (49 U.S.C.A. § 5(11))." We thus direct our attention now to the basic issue of whether the statutory authority conferred upon the ICC by the Interstate Commerce Act to approve and facilitate mergers of carriers includes the power to authorize changes in working conditions necessary to effectuate such mergers.

Section 5 of the Interstate Commerce Act vests in the Commission broad powers to approve, authorize, and facilitate railroad mergers. Section 5(2)(b) includes the following:

> "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . ."

Section 5(2)(c)(4) directs the Commission to consider the interests of the employees affected by a proposed transaction in determining whether the transaction is consistent with the public interest.

Section 5(2)(f) gives more particular consideration to the effects of the merger upon the railroad employees by providing in part:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. . . ."

Section 5(11), the provisions specifically relied upon by the trial court, states:

> "The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. . . ."

*Keat v. Civil Aeronautics Board*, 2 Cir., 204 F.2d 263, also relied upon by the trial court, supports its decision. That case involved the merger of air carriers. The statutory provisions for protection of air carrier employees are very similar to those for the protection of railroad labor. *See International Association of Machinists v.*

*Northwest Airlines, Inc.*, 8 Cir., 304 F.2d 206, 211. The approval power for the merger of air carriers vested in the Civil Aeronautics Board is quite similar to that of the ICC in railroad merger cases. The basic problem presented in *Kent* was the jurisdiction of the Board to determine seniority rights of the flight engineers of the merging airlines. The court held that the Board's power to approve mergers carries with it, in furtherance of the public interest in effecting mergers, the right to resolve conflicting seniority rights of employees of the merging carriers. In response to the argument that the order was invalid because it was in conflict with existing collective bargaining agreements, the court said:

> "A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates, such as are here involved, only upon such terms as it determines to be just and reasonable in the public interest. *National Licorice Co. v. National Relations Board*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799; *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230; *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344.
>
> "The paramount public interest required that due consideration be given conflicting seniority interests of both groups of these engineers. The Board has done that with meticulous care and, far from acting in an arbitrary and capricious way, has provided a method which fairly distributes the burdens and the benefits. Alternative methods suggested are at least no better and it was within the competence of the Board to make its determination free from private contract restraint." 294 F.2d 266.

In *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, Mr. Chief Justice Warren, speaking for the Court, gave detailed consideration to the interpretation of §5(2)(f) as it relates to the power of the

Commission to impose conditions for the protection of employees. Appellants there contended that no compensation plan was adequate unless it was based upon the premise that all the employees currently on the payroll remain in the surviving carrier's employment for at least their prior length of service up to four years. The Court rejected such contention upon the basis of a detailed study of the legislative history of the statute and its administrative interpretation. Attention was called to the rejection by Congress of the Harrington amendment which, if adopted, would have brought about a freeze of existing employees in their job rights.

*Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, involves another aspect of the interpretation of § 5(2)(f). The Court set out the legislative history of the statute which in our view lends much support to the trial court's interpretation of the statutes before us. The issue presented in the case just cited is whether the ICC had power in approving a merger to grant employees protection beyond the period of four years from the effective date of the approval of the merger. The Court answered this question in the affirmative. In discussing the legislative history, the Court states:

> "The second sentence of § (5)(2)(f) has a significant history of its own. On the floor of the House, Representative Harrington suggested the following proviso to follow the first sentence:
>
> "'*Provided, however*, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.'
>
> "The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and

should be fairly and equitably protected. *This amendment, however, threatened to prevent all consolidations to which it related.*" 339 U.S., 150-51. (Emphasis added.)

The Harrington amendment was defeated. We believe that the italicized sentence clearly points out the Court's view that the ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. Such interpretation is supported by legitimate inferences flowing from the rejection by Congress of the Harrington amendment. Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. *Elgin, Joliet & Eastern Ry.* v. *Burley*, supra; *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R.R.*, supra. Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

In *United States* v. *Lowden*, 308 U.S. 225, the issue was whether the ICC in approving a lease by one railroad to another has authority to prescribe as a condition that certain displaced employees be granted compensation. The case arose before the enactment of § 5(2)(f) in its present form. The Court recognized that under what is now § 5(2)(b) the welfare of affected employees was to be considered in determining the public interest. The Court held that the Commission had jurisdiction to impose conditions for the protection of the affected employees. The Court stated that the Commission had estimated that 75% of the savings resulting from consolidations will be at the expense of railroad labor. The Court states:

"Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute." 308 U. S., 233.

The Court also observed:

"If we are right in our conclusion that the statute is a permissible regulation of interstate commerce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted. . . . Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege." 308 U.S. 240.

While the three Supreme Court cases just discussed do not deal directly with the specific problem now confronting us (namely, whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act) in the situation here presented we believe that the cases afford very substantial support for the view that Congress intended the ICC to have jurisdiction to pro-

scribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.

Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5(11).[2]

The defendants argue that even if it be assumed (which is not conceded) that the ICC had jurisdiction under § 5(11) to render the provisions of the Railway Labor Act inoperative, it did not exercise such jurisdiction. While the carriers asked ICC to relieve them from the restraint of federal law, the Commission made no express finding or order to such effect. Thus defendants urge that only an abstract question is presented. In answer to a similar defense, the Commission in *Chicago, St.P., M. & O. Ry. Lease*, 295 I.C.C. 696, states:

> "We find nothing in that paragraph [§ 5(11)], or in other portions of section 5, which authorizes us to determine and declare the particular laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be re-

[2] As appellee points out in its brief, Congress has demonstrated by the proviso it attached to Title I, § 10 of the Emergency Railroad Transportation Act of 1933 (48 Stat. 211-17) that it knows how to expressly exclude the Railway Labor Act from the operation of a statute such as this. As the Supreme Court points out in *Texas v. United States*, 292 U.S. 522, 534 (dealing with other sections of the 1933 Act): "The insertion of the provision in Title I, with its restricted application, and the omission of a similar provision from Title II, indicate an intentional distinction."

lieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do."

We agree with the views just expressed. The Commission did actually approve the proposed merger and the included agreement for the protection of railroad employees as it was authorized to do. Such approval, in absence of language manifesting a contrary intent, carried with it any exemption from the restraints of other laws as contemplated by § 5(11) to the extent necessary to carry out the merger. We reject defendants' contention that the statutory interpretation problem before us presents only an abstract question.

Defendants further urge that the Commission made no finding that it was exercising a right to modify the collective bargaining agreements. The Commission did in fact prescribe the terms of compensation to be paid employees affected by the merger and the machinery agreed to by the parties for resolving any dispute that might arise in connection therewith. We have heretofore held that the Commission had jurisdiction to do so. As heretofore pointed out, the Commission at the express invitation of the carriers and the employees adopted the method agreed upon by them for solving any labor dispute which might arise out of displacement of employees as a result of the merger. The Commission found such agreement to be of the character contemplated by § 5(2)(f). It is apparent from the Commission's report and order that it considered the agreement which it had approved to have satisfied the obligations resting upon the Commission to protect the employees affected by the merger. Since the parties had completely agreed upon this matter in a manner which satisfied the Commission, no occasion arose for the ICC to take any further action with respect to specifying the conditions. Doubtless the Commission has a broad discretion in determining what conditions should

be imposed for the protection of labor and the method of working out any dispute that might arise in connection therewith. It is entirely possible that under some circumstances, the Commission would deem it best to leave the resolution of the dispute to the Railway Labor Act machinery. However, such course was not adopted here. The ICC merely approved the solution of the problem which had been agreed upon by the parties.

Thus, it is our view that the stipulated agreement became part of the conditions which § 5(2)(f) requires the Commission to impose for employee protection.

Defendants did not treat the stipulation as being an amendment to their collective bargaining agreement when North Western acted to consolidate the Marshalltown yards. Defendants took the position that the notice was a § 6 notice for new contract provisions.

No question is raised as to the authority of the labor signers of the stipulation to act, nor is any attack made upon the fairness or adequacy of the stipulation. In effect, the stipulation provides substantially the same machinery for arbitration that exists under § 7 of the Railway Labor Act in the event of an agreement of the parties to arbitrate after negotiations for adjustment under other provisions of the Railway Labor Act have failed. The ICC has many times provided for compulsory arbitration to settle labor disputes arising out of mergers where the parties have been unable to agree. See *Arnold* v. *Louisville & Nashville R.R.*, D.C. M.D. Tenn., 180 F. Supp. 429, 435-36.

In *New Orleans & Northeastern R.R.* v. *Bozeman*, 5 Cir., . . . F.2d . . . (31 LW 2367) the court, in approving a merger, imposed the so-called "Oklahoma conditions", for the protection of affected employees. Said conditions included a provision for compulsory arbitration of disputes relating to employees' discharged as a result of the

merger. The parties were unable to settle a dispute which arose from the dismissal of some employees. The railroad contended that under the Railway Labor Act it could not be compelled to arbitrate the question. The court, after stating that it found no authorities directly passing upon a complaint to compel arbitration in such a situation, states:

> "We conclude that Section 8 of the Conditions gave either party the absolute right to select arbitration as a means for settling the dispute and when such selection was made then arbitration was mandatory on the other party. We also conclude that the . . . [employees] made this election, as found by the trial court, and we find that there is no prohibition in the statute against giving effect to this term of the I.C.C. order."

We consider the Bozeman case to be based upon sound reasoning. Said decision affords substantial support for the trial court's decision. The fact that in Bozeman the employees were seeking arbitration while here arbitration is sought by the railroad is a distinction without difference under the peculiar facts of this case. In Bozeman, the railroad was bound to arbitrate because it accepted the merger upon the conditions imposed by the Commission which included compulsory arbitration. Here both parties are bound by their voluntary agreement to arbitrate merger labor disputes, which agreement was approved by the Commission and made a part of the § 5(2)(f) conditions.

The Railway Labor Act fosters no overriding policy or purpose which would deny enforcement of an agreement to arbitrate. See *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R.R.*, 7 Cir., 310 F.2d 503, 507, 511; *Duellingham* v. *Thompson*, D.C. E.D. Mo., 91 F. Supp. 787, 792, aff'd sub nom *Rolfes* v. *Duellingham*, 8 Cir., 198 F.2d 591.

See also *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30, 34-35.

On the other hand, the situation here is distinguishable in many respects from that presented in *Texas & New Orleans R.R.* v. *Brotherhood of Railroad Trainmen*, 5 Cir., 307 U.S. 151.* There the Norris-LaGuardia Act was also invoked and the railroads had actually instituted § 6 proceedings to change the contract. That case did not present a situation such as we have here, where both carriers and labor have joined in an agreement for the adjustment of labor disputes which would arise out of the approved merger. See also *McDow* v. *Louisiana So. Ry.*, 5 Cir., 219 F.2d 650.

Other issues are raised. We deem what we have said heretofore to be dispositive of this case. The result to be reached is often governed by the precise factual picture presented. We limit our decision to the peculiar factual situation of the present case.

We hold that the court had jurisdiction; that a justiciable controversy on statutory construction was presented; that the court committed no error in holding that the Commission acted within its jurisdiction in providing for the adjustment of labor disputes arising out of the approved merger; and that the court correctly decided the parties to this action should follow the procedures prescribed by the stipulation approved and adopted by the Commission.

Affirmed.

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* So cited in original slip copy of opinion. The correct citation is 307 U.S. 151.

**Judgment**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1962

No. 17,098

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, ET AL., *Appellants*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION.

Appeal from the United States District Court for the Southern District of Iowa

This Cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 7th, 1963.

**Order**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1962

No. 17,098

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, ET AL., *Appellants*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION.

Petition of Appellants For Rehearing Filed in this cause having been considered it is now here ordered by this Court that the same be and it is hereby denied.

April 3, 1963.

## Statutes Involved

### Railway Labor Act

Section 2, Seventh of the Railway Labor Act, 45 U. S. C., Section 152, Seventh, provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6 of the Railway Labor Act, 45 U. S. C., Section 156 provides:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

### Interstate Commerce Act

Section 5 of the Interstate Commerce Act, 49 U. S. C., Section 5, provides in part as follows:

> "(2) (a) It shall be lawful, with the approval and authorization of the Commission as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) * * *

If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall

give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * * * *

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

* * * * * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the

number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

* * * * * * *

**Labor Management Relations Act**

Section 301(a) of the Labor Management Relations Act, 29 U. S. C., Section 185(a), provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

**Decision of Interstate Commerce Commission in Finance Docket No. 19432**

CHICAGO, SAINT PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY LEASE

Decided May 5, 1958 and Reported in 295 I. C. C. 696.

Supplemental application of Chicago and North Western Railway Company for supplemental order under section 5(9) of the Interstate Commerce Act, as amended, dismissed. Prior report 295 I. C. C. 441.

*Supplemental Report of the Commission.*

By the Commission:

On December 28, 1956, the Commission, by division 4, approved and authorized the lease by the Chicago and North Western Railway Company, hereinafter sometimes referred to as North Western, of the lines of railroad and other properties owned, used, or operated by the Chicago, Saint Paul, Minneapolis and Omaha Railway Company, hereinafter sometimes referred to as the Omaha. *Chicago, St. P., M. & O. Ry. Co. Lease*, 295 I. C. C. 441. The so-called Oklahoma conditions, shown in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177, were prescribed to protect employees who might be adversely affected by the transaction.

On July 5, 1957, the North Western filed what it termed an application for supplemental relief, requesting that we, pursuant to our authority under section 5(9) of the Interstate Commerce Act, issue an order supplementing the order of December 28, 1956, which supplemental order shall (a) direct the parties to this proceeding[1] immediately

[1] The "parties to this proceeding" are not otherwise defined. The only persons who are parties to the proceeding when the supplemental application was filed are North Western and the Railway Labor Executives' Association; but it appears that relief is sought against 4 operating labor organizations.

to undertake discussions for the purpose of carrying out the integration and unification authorized by the order of December 28, 1956; (b) direct the parties to report back to this Commission in 60 days the status of their mutual efforts, pursuant to our direction aforementioned; (c) declare that, in consequence of the exclusive and plenary authority vested in this Commission with respect to the unification of railway carriers, Section 6 and related provisions of the Railway Labor Act are inapplicable and that, in order to enable the parties to carry out the transaction authorized and contemplated by our order of December 28, 1956, the parties to this proceeding are expressly relieved of the restraints, limitations, and prohibitions of all other laws, including expressly Section 6 of the Railway Labor Act; and (d) grant such other and further relief as we may deem necessary or appropriate in the premises to effectuate the order of December 28, 1956.

On August 30, 1957, the Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers, interveners, filed a joint protest and motion to dismiss or deny the supplemental application on grounds (1) that this Commission lacks jurisdiction to grant the requested relief; and (2) the supplemental application fails to state a claim upon which relief can be granted. North Western replied; and oral argument has been held.

POSITION OF NORTH WESTERN.—Effective January 1, 1957, the North Western leased all the lines of railroad and other properties owned, used or operated by the Omaha pursuant to the authority of the order of December 28, 1956. It immediately initiated efforts towards an integrated and unified operation. In the absence of the prescription by us of specific procedures, the North Western attempted to confer with the labor organizations concerning certain changes in operation. These proposed changes primarily involve a system wide revision and integration

of road crew assignments, the integration of caboose runs on through trains, and the integration and unification of yard and terminal operations, particularly at common points served by both carriers prior to the lease.

Under operating contracts existing at the commencement of the lease, former employees of the Omaha were given seniority rights and the right to perform work by seniority districts over all of that company's properties. Under North Western's seniority arrangements, its employees were given the exclusive right to perform work by seniority districts on North Western's properties. It is proposed to consolidate certain of the separate seniority districts on the two roads and to revise other seniority districts. Train seniority districts over the entire system including the Omaha would be reduced from 24 to 8. Many of the districts involved are far removed from the Omaha, and changes relating thereto would not seem necessarily related to accomplishment of unification between North Western and Omaha.

The North Western has successfully concluded agreements with the non-operating labor organizations providing for rearrangement of seniority districts and other measures permitting the integration of the railroads insofar as those organizations are concerned. However, no progress has been made in the case of proposed changes involving the so-called operating brotherhoods.[2] The North Western extended an invitation to the labor organizations to meet in conference and discuss the changes, but the latter declined to enter into such discussions and insisted that the former present its proposals in the manner required by the Railway Labor Act, 45 U. S. C. 151, *et seq.*

[2] These include the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, and the Brotherhood of Railroad Trainmen.

The North Western declined to follow this procedure, taking the position that the Railway Labor Act was not applicable to changes occasioned by a unification authorized under section 5 of the Interstate Commerce Act and that we alone have jurisdiction in the matter.

POSITION OF LABOR ORGANIZATIONS.—The labor organizations on April 26, 1957, invoked the services of the National Mediation Board under Section 5, First, of the Railway Labor Act.[3] The organizations took the position that the dispute concerned (1) the proposals of the carriers for changes and revisions in the written agreements of the North Western and the Omaha, and (2) the refusal of the carriers to hold conferences under the Railway Labor Act. It is their view that the proposals for the revisions of their collective bargaining agreements are subject to the requirements of Section 6 of the Railway Labor Act.

The National Mediation Board, after first advising the labor organizations that the Board's file did not show that a Section 6 notice had been served by either party on the other in connection with intended changes in agreements which might result from the consolidation of the North Western and the Omaha, subsequently found that such notice was contained in a communication, by North Western, dated March 18, 1957, indicating generally the character of the operating changes which it wished to discuss.

[3] This section of the act reads in pertinent part as follows:

"The parties, or either party to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused."

Thereafter, on June 14, 1957, the Board docketed the proceeding as Case No. A-5495. North Western has advised the Board that it cannot concur in any assumption of jurisdiction by such Board under Section 6 which necessarily implies that our jurisdiction is not exclusive and plenary. North Western states that it would meet with the labor organizations under the auspices of the Board on a voluntary basis, but not under the aegis of the Railway Labor Act.

Upon acceptance of jurisdiction by the National Mediation Board the labor organizations under date of June 17, 1957, distributed to their members a strike ballot by which authority is sought to call a strike on the North Western if there is a failure to agree in the course of Section 6 negotiations.

Discussion of Contentions and Findings.—The North Western stresses that there are 3 aspects of the order of December 28, 1956, which must be in mind with respect to the issues presented by its supplemental application: First, that the order clearly and specifically contemplated an integration of the physical operations of the roads as well as other aspects of running railroads in that it referred to the physical integration, to the savings and operational costs that could be realized, and to the improvements in service which would be engendered by physical unification of operations; second, that the order provided for inclusion in its scope of the Oklahoma conditions for the protection of employees adversely affected by the transaction; and third, that the order recognized and exerted what appeared to be the full range of the Commission's powers under section 5(11) of the act.

The North Western states that its efforts to integrate the two railroads through its lease with the Omaha have reached an impasse, and therefore it has filed the supplemental application, heretofore described, under section

5(9) of the act, invoking sections 5(2)(b) and 5(11) as the basic sources of our jurisdiction for the relief sought. The pertinent portions of such sections of the act appropriately designated are as follows:

> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (1), (2), or (7), as it may deem necessary or appropriate. (Section 5(9).)

> If the Commission finds that, *subject to such terms and conditions and such modifications as it shall find to be just and reasonable*, the proposed transaction is within the scope of sub-paragraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, *upon the terms and conditions, and with the modifications*, as found to be just and reasonable; * * *. (Emphasis supplied.) (Section 5(2)(b).)

> The authority conferred by this section shall be exclusive and plenary, * * * and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchise acquired through such transaction. (Section 5(11).)

North Western states that it requests us neither to interpret or enforce existing contracts, nor to determine

what specific employees will be affected by the proposed operational revisions. It asserts, however, that under section 5(2)(b) we have the power which may be exercised in appropriate circumstances to condition our approval of proposed unifications on the accomplishment of specified operational revisions which may be deemed necessary to assure realization of the greater operating efficiencies and economies in contemplation. On this basic premise, it requests that we exercise authority under section 5(2)(b) to prescribe procedures under which, with reference to the authority granted under the order of December 28, 1956, the North Western and the interested labor organizations must by conference and negotiation concur in a plan of operational revisions.

Predicated upon the contention that the divergent purposes served by the Railway Labor Act, on the one hand, and section 5 of the Interstate Commerce Act, on the other, render the procedures of the former a positive barrier to the achievement of the purposes of the latter, North Western requests that express relief be granted from the restraints, limitations, and prohibitions of the Railway Labor Act.

The North Western relies upon the decision of the United States Court of Appeals, *Kent v. Civil Aeronautics Board*, 204 F. 2d 263 (2d Cir. 1953), cert. den. 346 U.S. 826 (1953), in confirmation of its position as to our authority under section 5. The above cited case arose out of the action of the Civil Aeronautics Board in approving, pursuant to provisions of the Civil Aeronautics Act of 1938, following direction of the President, the acquisition of American Overseas Airlines by Pan American World Airways, *North Atlantic Route Transfer Case*, 11 CAB 676 (1950). In a subsequent supplemental opinion that Board addressed itself to the matter of protection of employees of the carriers involved and imposed conditions for the

protection of adversely affected employees similar to those imposed by this Commission in section 5 (2) proceedings. A difficulty with respect to the integration of some groups of employees was encountered. The Board at first left the solution of such problem to be settled by negotiation by the interested parties and, failing such settlement, to be submitted to arbitration. *North Atlantic Route Transfer Case*, 12 CAB 124 (1950). Some groups of employees did settle their differences by negotiation. In the case of others, agreement was not achieved and the services of the National Mediation Board were invoked. Mediation conferences were held by the National Mediation Board and were successful as to certain employee groups, but unsuccessful as to the flight engineers. Thereupon the Civil Aeronautics Board reopened the case and ordered, according to a formula, the integration of such employees into the Pan American seniority lists. Subsequently, review of the proceeding was petitioned, limited to that portion of the orders of the Civil Aeronautics Board which provided for the integration of the flight engineers of both carriers involved into the seniority list of the surviving carrier.

The basic contention was that the Civil Aeronautics Board was without jurisdiction to make any order determining the respective seniority rights of the flight engineers. The Court, in its opinion, stated that the statutory authority of that Board to deal with proposed mergers was broad enough to enable that Board "to approve a merger and transfer of a certificate upon such terms and conditions as it shall find to be just and reasonable in the public interest." "Although" it continued, "there is no express statutory grant of power to impose conditions which will lessen the adverse impact of a merger upon employees of the merged companies, such power is implicit as one necessary to the performance of the Board's duty

to condition approval with due regard to terms which are just and reasonable in the interest of the public".

The orders of the Board under attack went beyond affording financial protection and prescribed a seniority list which the Pan American had to adopt. In this connection, the court said:

> • • • when a merger involves two or more groups of employees each having separate seniority rights, the public interest in maintaining peaceful labor relations so as to effect an orderly continuation of operations is not always satisfied merely by conditioning approval of the merger on financial protection to the employees. Industrial strife may arise by reason of a dispute between the two or more employee groups as to how a unified seniority list should be drawn. And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carrier so as to protect adequately the public interest is what Sec. 408(b) of the Act contemplates, and that is what these orders accomplish. The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it.

It is important to note that the decision in the *Kent* case holds that that power of the Board is to direct the carrier. No requirement was made upon employees. Likewise under section 5 of the act we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction. See *Valdosta S. R. Purchase*, 282 I. C. C. 765, 711; *Coordinated—Purchase—Merrilutt*, 56 M. C. C. 635.

Under Section 5 (2) (f) of the act, we are *required* to impose upon the carriers in each approved transaction, conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything. Thus, North Western's request that we order such parties to negotiate and report back to us must be denied.

The North Western has further requested that we issue a supplemental order which shall declare that, in consequence of exclusive and plenary authority vested in this Commission in respect to the unification of railway carriers, Section 6 and related provisions of the Railway Labor Act are inapplicable, and that, in order to enable the parties to carry out the transaction authorized and contemplated by the order of December 28, 1956, the parties to the proceeding are expressly relieved of the restraints, limitations, and prohibitions of all other laws, including expressly section 6 of the Railway Labor Act. In requesting such a declaration by us, North Western relies primarily upon the provisions of paragraph 11 of section 5, *supra*. We find nothing in that paragraph, or in other portions of section 5, which authorizes us to determine and declare the particular laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do. *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118. Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western requests us to do.

It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. The order did not provide any particular method for integration of the physical operations involved; and, except for the imposition of the above-mentioned conditions for the protection of employees, did not deal with employer-employee relationships.

In view of the foregoing, we find that we have no authority to grant the relief which North Western requests, and its supplemental application will be dismissed.

An appropriate order will be entered.

GOFF, Commissioner, did not participate in the disposition of this proceeding.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 187

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS**, an unincorporated association; **G. W. MINSON**, individually and as Secretary, General Committee of Adjustment, Chicago and North Western Railway Company, and Local Chairman of said Association; **A. O. Best**, individually and as Local Chairman of said Association; **HOWARD R. GILLETTE**, individually and as Local Chairman of said Association; **R. B. SEGER**, individually and as Secretary and Local Chairman of said Association; **BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN**, an unincorporated association; **W. I. CARREL**, individually and as Vice Chairman of said Association; **K. O. WHITE**, individually and as Local Chairman of said Association; **VAUGHN R. WARD**, individually and as General Chairman of said Association; **E. H. DONNELLY**, individually and as Vice Chairman of said Association; **J. R. MAYER**, individually and as Local Chairman of said Association; **BROTHERHOOD OF RAILROAD TRAINMEN**, an unincorporated association; **W. A. BURKE**, individually and as Vice Chairman and Local Chairman of said Association; **T. A. MILLER**, individually and as Local Chairman of said Association; **E. STOUVENEL**, individually and as Local Chairman of said Association; **M. VITIRITTO**, individually and as Local Chairman of said Association; **R. W. STANLEY**, individually and as General Chairman of said Association; **H. L. HEMPHILL**, individually and as Local Chairman of said Association; **SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO**, an unincorporated association; **E. H. KANE**, individually and as General Chairman of said Association; **E. K. BRAINERD**, individually and as Local Chairman of said Association, *Petitioners*,

*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY COMPANY**, a corporation, *Respondent*.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1159.

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS**, an unincorporated association; **G. W. MINSON**, individually and as Secretary, General Committee of Adjustment, Chicago and North Western Railway Company, and Local Chairman of said Association; **A. O. Best**, individually and as Local Chairman of said Association; **HOWARD R. GILLETTE**, individually and as Local Chairman of said Association; **R. B. SEGER**, individually and as Secretary and Local Chairman of said Association; **BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN**, an unincorporated association; **W. I. CARREL**, individually and as Vice Chairman of said Association; **K. O. WHITE**, individually and as Local Chairman of said Association; **VAUGHN R. WARD**, individually and as General Chairman of said Association; **E. H. DONNELLY**, individually and as Vice Chairman of said Association; **J. R. MAYER**, individually and as Local Chairman of said Association; **BROTHERHOOD OF RAILROAD TRAINMEN**, an unincorporated association; **W. A. BURKE**, individually and as Vice Chairman and Local Chairman of said Association; **T. A. MILLER**, individually and as Local Chairman of said Association; **E. STOUVENEL**, individually and as Local Chairman of said Association; **M. VITIRITTO**, individually and as Local Chairman of said Association; **R. W. STANLEY**, individually and as General Chairman of said Association; **H. L. HEMPHILL**, individually and as Local Chairman of said Association; **SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO**, an unincorporated association; **E. H. KANE**, individually and as General Chairman of said Association; **E. K. BRAINERD**, individually and as Local Chairman of said Association, *Petitioners,*

*vs.*

**CHICAGO AND NORTH WESTERN RAILWAY COMPANY**, a corporation, *Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Chicago and North Western Railway Company ("North Western"), under Rule 24 of this Court, submits this brief in opposition to the petition for writ of certiorari filed by various labor organizations, and certain of their officers and agents, defendants in the District Court and appellants in the Court of Appeals below (hereinafter collectively called "labor organizations").

## STATEMENT OF THE CASE.

### (a) The Judgments of the Courts Below.

A restatement of the case is required for a fuller understanding of the factual basis for the judgment of the District Court, as affirmed by the Court of Appeals.

The dispute between North Western and the labor organizations, from which this action for a declaratory judgment arose, involved the proposed consolidation by North Western of two of its separate railroad yards at Marshalltown, Iowa into a single yard. The following statement of the issue by the District Court was cited with approval by the Court of Appeals (App. to Petn. 9a, 18a-19a):

> "The basic question presented herein is whether the parties are required to follow the procedures of the Railway Labor Act (45 U.S.C., Sec. 151, et seq.) in effecting the proposed co-ordination of North Western's railroad yards at Marshalltown, Iowa, or whether the parties are required to follow the procedures prescribed by the 'stipulation' entered into by the parties and authorized by the Interstate Commerce Commission in its order approving the merger under the provision of Section 5(2) (f) and Section 5(11) of the Interstate Commerce Act, 49 U.S.C., Sec. 5(2) (f), 5(11)."

The final declaratory judgment of the District Court on this basic question, as affirmed by the Court of Appeals, was as follows (App. to Petn. 14a, 19a, 34a):

"1. That the Railway Labor Act (49 U.S.C. 151, et seq.) is inapplicable to the proposed coordination of plaintiff's Marshalltown railroad yards.

"2. The parties hereto in carrying out the proposed coordination are required to follow the procedures prescribed by the stipulation entered into on August 4, 1960 and filed in Finance Docket No. 21115 before the Interstate Commerce Commission."

**(b) The Proceedings Before the Commission, Including the Stipulation Under Section 5(2)(f) of the Interstate Commerce Act.**

The proceedings before the Interstate Commerce Commission to which the judgment of the District Court refers involved the Commission's approval of the purchase by North Western of the properties and franchises of The Minneapolis & St. Louis Railway Company ("M&StL") (R. 225-44). The Commission's jurisdiction over this transaction derives from Sections 5(2) and 5(11) of the Interstate Commerce Act under which it is vested with "exclusive and plenary" authority to approve and authorize "any carrier * * * to purchase * * * the properties of another * * *."

As a partial basis for its conclusion that the proposed transaction was "clearly consistent with the public interest" (R. 234-235), the Commission found (R. 232):

> "Integration of the two railroads would permit the consolidation of supervisory, accounting and traffic functions, and elimination of duplicate facilities through the consolidation of various yards and terminals."

With reference to the elimination of duplicate facilities through the consolidation of yards and terminals, the evidence before the Commission disclosed that among the principal M&StL yards were those at Marshalltown, at which

point North Western also maintained its own separate yard (R. 141). The evidence also referred to the resultant ability of North Western, in the event of purchase, to "eliminate a number of duplicating facilities," there then being "twenty common points with the M&StL" (R. 153). Although it was contemplated that the newly acquired property would "in general" be operated as a separate division of North Western, it was also expressly recognized that there might be some "minor" shifting of divisional boundaries (R. 150).

In approving the proposed transaction under Section 5 (2) (a) of the Interstate Commerce Act, the Commission was subject to the mandate of Section 5 (2) (f), which provides that, as a condition to its approval of any Section 5 (2) transaction, the Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." Section 5 (2) (f) does not require, however, that "a fair and equitable arrangement" be formulated exclusively by the Commission. Thus, the concluding sentence of this paragraph provides:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

With reference to its obligations under the first sentence of Section 5 (2) (f), the Commission noted and found in its order as follows (R. 238):

> "Applicants also entered into a stipulation with railway labor organizations represented by the Railway Labor Executives' Association for the protection of all employees of the applicants whose bargaining representatives are members of the association. *The stipulation is of the character contemplated by section 5(2) (f) of the act for the protection of railway employees who may be adversely affected by the trans-*

> *action authorized.* As to the employees covered by the stipulation no conditions in our order are necessary. As to employees of the applicants not covered by the aforesaid stipulation, we will prescribe for their protection conditions similar to those set forth in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177."*

The stipulation to which the Commission referred is of record (R. 200-204).** As shown therein (R. 200, 201, 204), the Railway Labor Executives' Association (also referred to as Joint Committee of Railway Labor Organizations), a signatory of the Stipulation, acted as the duly designated representatives of the four petitioning labor organizations, among others. The fact of such duly authorized representation is also the subject of Paragraph 1-(f) of a separate stipulation of record by the parties in this proceeding, dated December 5, 1961 (R. 43-44).

The Stipulation, in referring to the Commission's statutory duty under Section 5 (2) (f) to require "a fair and equitable arrangement to protect the interests of the railroad employees affected," provides (R. 203):

> "That in the event the Interstate Commerce Commission shall grant the authority requested in Finance Docket No. 21115, the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employes as provided in Section 5 (2) (f) of the Interstate Commerce Act, as amended."

The Stipulation also provides that with certain modifications thereafter specified:

> "* * * the Agreement of May, 1936, Washington D. C.,

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* Emphasis is supplied throughout this brief.

** This document in its entirety is captioned "Stipulation and Agreement." The Agreement is attached to and made a part of the Stipulation as Exhibit A. For brevity, the Stipulation and Agreement will be referred to as the "Stipulation."

> commonly referred to as the Washington Job Protection Agreement, is hereby adopted and shall be applied for the protection of employees of the above-named carriers who may be adversely affected by Interstate Commerce Commission approval of the applications or petitions in the proceedings designated as Finance Docket No. 21115, the primary object of which is the merger of the carriers named above . . . ."

A copy of that agreement is also of record (R. 205-224).

Section 1 of the Washington Agreement states as its purpose in pertinent part as follows (R. 205):

> "That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination."

The term "coordination" is thereafter defined in Section 2(a) as follows (R. 206):

> "The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

As may be noted from its provisions, the remaining portions of the Washington Agreement deal largely with the procedures governing the effectuation of each coordination and the manner of determining eligibility for, and the computation of, various monetary allowances and other financial benefits for employees displaced or otherwise adversely affected by a coordination. Section 5, in particular, relating to the necessity of an agreement in certain circum-

stances as to the manner in which a coordination may be effected, provides as follows (R. 207):

> "Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

Under Paragraph 2 of the Stipulation, however, the parties deleted Section 13 of the Washington Agreement and inserted in its place language appropriate to the purpose of the Stipulation to provide protection within the statutory language of Section 5(2)(f) and an arbitration clause more suitable to the circumstances of the pending transaction (R. 203).

It was also recognized that not all of the separate facilities of North Western and M&StL could be coordinated on the effective date of the purchase transaction. Accordingly, in contemplation of subsequent individual coordinations to be effected by North Western, as the surviving carrier, section 11 of the Stipulation provides as follows (R. 202):

> "The term 'effective date of coordination' as used herein means, with respect to the various facilities or operations to be consolidated, the date on which the surviving carrier consolidates the particular facilities or operations."

**(c) North Western's Proposed Consolidation of Its Marshalltown Yards in Accordance With the Procedures Under the Stipulation.**

As previously noted, the evidence before the Commission disclosed that among the separate facilities through which North Western and M&StL, by virtue of their separate identity, had rendered separate services in 20 different communities were the railroad yards at Marshalltown, Iowa (R. 141). A map of these yard facilities is of record (R. 245). As shown therein, the yard areas and tracks of the two railroads were contiguous and were connected by a track over which the two separate railroad companies interchanged traffic.

Prior to November 1, 1960, the effective date of the purchase transaction, North Western handled its switching in its Marshalltown yard through a single yard engine assigned to one 8-hour shift 5 days each week.* Its employees at this yard consisted of the following classes and numbers: One engineer, represented for collective bargaining purposes by the Brotherhood of Locomotive Engineers; one fireman, represented by the Brotherhood of Locomotive Firemen and Enginemen; one yard foreman and two yard helpers, each represented by the Brotherhood of Railroad Trainmen. The engineer and firemen held seniority in their respective crafts over the east subdivision of respondent's Iowa Division, which included its Marshalltown yards. The yard foreman and helpers held seniority in all of respondent's yards on the east and west subdivisions of its Iowa Division.

M&StL handled its larger Marshalltown yard switching operations through the assignment of yard engines cover-

*Unless otherwise noted, the remaining statement under this part (c) is based on the admitted allegations of the complaint (R. 7-8, 42).

ing two 8-hour shifts, one shift covering 6 days, and the other 7 days, each week. The following classes and number of employees were assigned to each shift: One engineer, represented for collective bargaining purposes by the BLE; one fireman, represented by the BLF&E; and one yard foreman and two yard helpers, represented by SUNA. Each of the engineers and firemen held seniority in their respective crafts on all M&StL lines of railroad south of Albert Lea, Minnesota to Peoria, Illinois. Seniority of the yard foreman and helpers was limited to the Marshalltown yards. In addition to these employees, there was also assigned to a single 8-hour shift, 6 days each week, a yardmaster, represented by the Railroad Yardmasters of America, a labor organization not involved in this controversy.

Section 4 of the Washington Agreement governs the notice requirements in the case of each proposed coordination. By appropriate posting of notice thereunder dated December 16, 1960, North Western advised all employees who might be affected "that the C&NW contemplates coordinating yard operations at Marshalltown * * * effective not earlier than March 17, 1961." The notice further stated that it was contemplated that all Marshalltown yard operations would be placed under the jurisdiction of the M&StL Division superintendent and that, in effect, "yard assignments would include the entire combined yards without being limited to one or the other of the separate yards belonging to either North Western or M&StL prior to the purchase transaction. The notice also stated that "* * * it was contemplated that the coordination will result in the abolishment of 1 yard engine assignment (1 engineer, 1 fireman, 1 foreman and 2 helper assignments)." By letter of December 13, 1960 to the representatives of the employees involved, to which letter was also attached a copy of the notice to be posted on December 16, North Western requested a conference on the proposed coordination in ac-

cordance with Section 4 of the Washington Agreement, as stipulated, for the purpose of reaching an agreement, as contemplated by Section 5 of the Washington Agreement. The letter and notice are of record (R. 248-250).

**(d) The Refusal by the Labor Organizations to Process the Proposed Coordination in Accordance With Their Stipulation.**

North Western's letter and notice were ultimately followed by an initial conference between the parties on January 12, 1961. Prior to this meeting, the conflicting positions of the parties were set forth in correspondence between their respective representatives (Exs. F-1 through F-10; R. 251-262). As shown particularly in Exhibits F-1, F-3, F-4, F-6, F-7 and F-8, the representatives of the BRT and BLF&E disavowed any intention to process the proposed coordination under the Stipulation and Washington Agreement, contending instead that North Western's notice constituted the service of a Section 6 proposal under the Railway Labor Act or that the proposal, if made under the Washington Agreement, was in violation of the Railway Labor Act (R. 251-253; 255-260).

In correspondence following the conference of January 12, 1961, each of the labor organizations expressly asserted, or clearly implied, that the proposed coordination would involve changes in existing seniority arrangements, and would therefore be processed only as a Section 6 proposal under the Railway Labor Act (Exs. F-11 through F-17; R. 262-269).

In view of petitioners' refusal to attempt to reach any agreement as provided in the Stipulation and Washington Agreement, North Western's Director of Personnel advised petitioners on March 29, 1961 of the North Western's intent to submit the dispute to arbitration under the terms

of the Washington Agreement, as modified by Section 2 of the Stipulation. On April 5, 1961 petitioners were advised of the identity of the arbitrator designated by North Western (Exs. F-18 and F-19; R. 269-271). By subsequent letters to North Western's Director of Personnel, the BLF&E, BRT and BLE again disavowed any intent to process the proposed coordination through arbitration, as provided in the Stipulation and Washington Agreement (Exs. F-20 through F-25; R. 271-276).

On April 7, 1961 North Western's Director of Personnel received the following telegram from the Executive Secretary of the National Mediation Board warning of a threatened strike (Ex. F-27; R. 277):

> "Following wire received from BLF&E and BRT 'Consideration now being given towards approving withdrawal of C&NW railway employees represented by BRT and BLF&E effective with carrier proposed changes at Marshalltown, Iowa.' Please wire statement."

By telegram of April 10 and letter of April 11, 1961, in reply, North Western's Director of Personnel summarized the history of the controversy and requested that the National Mediation Board designate a neutral arbitrator, as contemplated by the parties under Section 2 of their Stipulation (Exs. F-28 and F-29; R. 277-280). Thereafter, the National Mediation Board requested by letter that the national presidents of the BLF&E and BRT comment on the representations made by North Western (Ex. F-30; R. 280). A copy of this letter was also sent to the Grand Chief Engineer of the BLE. In summarizing his position in his reply to the Board, the Grand Chief Engineer asserted that "(N)owhere in either of the agreements can it be shown that the contents override the application of the provisions of Section 6 of the Railway Labor Act when revision and or abrogation of contractual rules

are necessary to fulfill the proposed plans of the carrier or carriers." (Ex. F-31; R. 281.) In turn, the presidents of the BRT and BLF&E advised the Board that "(W)e concur in the views expressed by him [the Grand Chief Engineer]." (Ex. F-33; R. 283.) Replying to these letters, North Western's Director of Personnel reiterated his request "that the neutral member of the arbitration committee be appointed as promptly as possible." (Ex. F-34; R. 284.)

In his reply of May 1, 1961 to the Chief Executive Officers of the BLE, BLF&E and BRT, the Executive Secretary of the National Mediation Board expressed the Board's understanding of the controversy in the following terms (Ex. F-35; R. 286):

> "If the Board understands the current situation, it is the position of the organizations that in order to make effective the coordination of facilities at Marshalltown which has been proposed by the carrier, the organizations are of the opinion that it will be necessary for the carrier to revise certain rules of the existing agreements in order to bring about this consolidation or coordination and that such revisions must be handled under Section 6 of the Railway Labor Act."

A conference held on May 18, 1961 at the request of the Board "to develop information regarding the proposals of the carrier and the positions of the various organizations" resulted in the reassertion of their respective positions by all parties to the controversy (Par. XVII, Cplt., Admitted; R. 17, 49).

As a result of the failure to reach agreement on the proposed coordination in accordance with the terms of the Stipulation and Washington Agreement, North Western's Marshalltown yards are presently conducted through the same separate operations and with the same arrange-

ment of labor forces as existed prior to November 1, 1960, during which time these yards were under the separate ownership, operation and control of North Western and M&StL (Par. XVIII, Cplt., Admitted: R. 18, 49).

## QUESTION PRESENTED.

Where a proposed consolidation of railroad yard facilities was clearly contemplated as a part of a transaction approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act, may railroad labor organizations invoke the procedures of the Railway Labor Act to avoid the effectuation of that consolidation in accordance with the procedures required by an agreement entered into between the labor organizations and the carrier under Section 5(2)(f) of the Act?

## SUMMARY OF ARGUMENT: REASONS FOR DENYING THE WRIT.

1. The proposed Marshalltown yards consolidation falls within the scope of the transaction approved by the Commission and the Stipulation of the parties.

2. Having been entered into expressly for the purpose of Section 5(2)(f) of the Interstate Commerce Act in connection with the specific purchase transaction to which it relates, the Stipulation is not an agreement under the Railway Labor Act and the courts below correctly concluded that its implementation and operation are not displaced by the procedures of that Act.

3. The petitioners observe that "(W)hether a railway labor agreement may be judicially enforced by an order entered for specific performance of its provisions for voluntary arbitration is believed to present a question of first impression." Whatever the general validity of this com-

ment, it is a non-sequitur here since this question is not presented by the opinions or judgments of the courts below.

4. The decision of the Court of Appeals below has been expressly limited to the "peculiar factual situation of the present case," and, in any event, there is no conflict between the holdings by the Court of Appeals for the Eighth Circuit below and the Court of Appeals for the Fifth Circuit in *Texas & New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F. 2d 141 (5th Cir., 1962).

# ARGUMENT.

## I.

## THE PROPOSED MARSHALLTOWN YARDS CONSOLIDATION IS CLEARLY WITHIN THE SCOPE OF THE TRANSACTION APPROVED BY THE COMMISSION AND WITHIN THE CONTEMPLATION OF THE PARTIES TO THE STIPULATION.

### A. The Consolidation of These Two Separate, But Contiguous and Connected Railroad Yards at Marshalltown, Iowa, Together With the Elimination or Coordination of Other Duplicating Facilities, Was an Essential Consideration in the Commission's Approval of the Purchase Transaction.

North Western's proposed consolidation of its Marshalltown yards flows directly from its acquisition of the properties of the M&StL., as authorized by the Interstate Commerce Commission in its Finance Docket No. 21115. It is an integral part of the over-all unification of these two separate properties clearly to be anticipated from the Commission's approval of the entire transaction. In its order the Commission found that "each applicant provides service at the present time through separate facilities to 20 different communities * * *"; and further that "(I)ntegration of the two railroads would permit the * * * elimination of duplicate facilities through the consolidation of yards and terminals." (*Supra*, p. 3).

*In suggesting that the proposed yard consolidation was not to be anticipated from the evidence before the Commission, petitioners engage in an arithmetical tour de force intended to establish that yard consolidations proposed by North Western will have a far greater impact on employees than the consolidation of accounting departments to which considerably greater emphasis was given

The Marshalltown yards are contiguous, connected and obviously capable of being operated most efficiently as a single yard rather than as two separate and unrelated entities. As stated in the notice of proposed coordination, it is contemplated that as a single unit these yard facilities can be operated with one less engine and engine crew assignment.

As noted, the Commission's order authorizing North Western's acquisition of the M&StL properties was entered pursuant to its powers under Section 5(2) of the Interstate Commerce Act to give approval and authorization to "any carrier • • • to purchase • • • the properties • • • of another." The dominant legislative purposes underlying the enactment of Section 5(2), and of its predecessor sections of the Interstate Commerce Act, have been declared in unmistakable terms by this Court.

In *New York Central Securities Corporation* v. *U. S.*, 287 U. S. 12 (1932), in construing the term "public interest" under the similar provisions of Section 5(2) of the Transportation Act of 1920, the Court stated (at p. 25):

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by North Western in its evidence before the Commission. Pfau, p. 6).

The reference to "125 to 150" accounting department employees who would be "adversely affected" related to the elimination of that many positions from which the substantial economies specified in Hearing Exhibit No. 1 under "General Expenses" would be realized (R. 197-200). By comparison, as proposed by North Western, three yard consolidations at Marshalltown, Mason City and Minneapolis would result in the elimination of a total of five positions (R. 250, 305, 307). The references in the notices to 304 employees "directly affected" relates only to the combination of the separate seniority rosters on which these employees are included. It does not relate to savings from the elimination of such positions. Because of the relatively small savings involved in this category, the total economies from yard consolidations were not specifically computed in the evidence before the Commission. However, as already noted, specific reference was made in the evidence and in the Commission's order to the integration or the elimination of duplicating yard facilities and to minor shifts in divisional boundaries.

> "* * * the term * * * has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

Similarly, in *Texas v. U. S.*, 292 U. S. 522 (1934), the Court referred to the policy considerations underlying the Acts of 1920 and 1933 in these terms (at p. 530):

> "It is a primary aim of that policy to secure *the avoidance of waste.* That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Cases cited.] The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provisions and best use of transportation facilities'."

This Court found these public purposes to have been further extended by the Transportation Act of 1940. Thus, in *Seaboard Air Line Railroad Company v. Daniel*, 333 U. S. 118 (1948), reference was made (at pp. 124-5) to the Congressional policy, reflected in Section 5, of providing for the maintenance and development of an economical and efficient railroad system as "a matter of primary national concern." See also: *Schwabacher v. U. S.*, 334 U. S. 182 (1948), at pp. 191-195.

Section 5(11) is applicable by operation of law to all transactions approved by the Commission under the provisions of Section 5. Accordingly, its particular provisions must necessarily be construed in terms of the general legislative purposes of Section 5. In pertinent part, Section 5(11), with reference to the Commission's general authority under Section 5, declares:

> "(11) The authority conferred by this section shall be exclusive and plenary * * * and any carriers * * * participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

This Court has in fact construed these provisions to apply, not only to the formal consummation of an approved transaction, but to any specific measures necessary to effect the economies within the contemplation of the Commission's order. Thus, in *Texas* v. *U. S.*, *supra*, it was held that notwithstanding the limitations of a state law which prohibited the removal of a railroad's general offices and shops, the lessee under a Commission-approved lease, by virtue of the provisions of the predecessor section to the present Section 5(11), was empowered to carry into effect the removal of such offices and shops in order to realize the inherent economies of the lease transaction. It would, of course, have been possible for the carrier, consistent with state law, merely to execute the lease. In such case the lease may have been legally consummated, but without the ultimate realization of its potential economies. For this

Court to have so limited the effect of Section 5(11) to mere matters of form, however, would have been to emasculate the substantial aims sought by Congress in its enactment. Like the removal of offices and shops in the *Texas* case, the consolidation of the separate facilities at Marshalltown, and other common points, is among the inherent purposes of the entire purchase transaction.

**B. The Proposed Coordination Was Clearly Contemplated by the Parties as Falling Within the Stipulation and the Courts Below Correctly Held That the Provisions of the Stipulation, Rather Than Those of the Railway Labor Act, Governed Its Effectuation.**

If North Western and M&StL, as separate carriers, had sought to consolidate their Marshalltown yards, it is immediately apparent that such proposal would have constituted a coordination under the following provisions of Section 2(a) of the Washington Agreement (R. 206):

> "The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

Accordingly, under the provisions of Section 5 of the Washington Agreement, it would have been necessary for the two carriers to provide within their plan of coordination "for the selection of forces from the employes over all the carriers involved * * *" (R. 207). Such selection is, of course, necessitated by the merger of the previously separate seniority rosters. The objective of such selection is the treatment of the employees involved on a fair and equitable basis.

The Stipulation, which incorporates the general pro-

visions of the Washington Agreement, was entered into in anticipation of the complete "merger of the carriers" in the pending Commission proceeding. It was necessary, therefore, to modify the Washington Agreement in order to relate its provisions to the subsequent coordination of specific facilities by North Western, as the surviving carrier. Thus, Section 1D of the Stipulation was incorporated to provide (R. 202):

> "The term 'effective date of coordination' as used herein means, with respect to the various facilities or operations to be consolidated, the date on which the surviving carrier consolidates the particular facilities or operations."

What, then, is now actually in issue? First, the labor organizations belatedly assert that it was never intended that the Washington Agreement might be used as a vehicle for the merger of seniority rights. But then the question must inevitably be asked, if not this, for what? Does the "rearrangement of forces" expressly contemplated under Section 5 of the Washington Agreement suddenly exclude possible rearrangements in seniority rights? Certainly, the agreement has been consistently construed to the contrary under the special self-contained procedures established for its interpretation and enforcement.

The decision of the Committee created under Section 13 of the Washington Agreement in the *Escanaba Yard and Dock* case leaves no question regarding the contemplated modification of seniority rights under this agreement (Ex. G; R. 297-299). In that decision, following the coordination by the two carriers of their Escanaba yards and docks as the result of a Commission approved pooling agreement, the Committee held that employees of the Milwaukee Road whose Escanaba yard and dock were abandoned, were nevertheless entitled to 34% of the work on North Western's yard and dock. The award of such

work to Milwaukee Road employees was at the expense of North Western's employees, whose seniority rights otherwise entitled them to the exclusive performance of such work. The basic dispute, it should be noted, was among the employees with regard to this issue. The decision was signed by representatives of three of the labor organizations in this proceeding, the BRT representatives dissenting for reasons not disclosed.

The decision rendered by a neutral referee in Docket No. 70 involves a coordination even more analogous to the proposed consolidation of North Western's Marshalltown yards (Ex. H; R. 299-302). That decision involved the displacement of Pacific Electric employees over three miles of that company's railroad by employees of the Southern Pacific. The arrangement resulted from the agreement of the two carriers for the operation of this segment of Pacific Electric's railroad by the Southern Pacific. Once again, such an arrangement clearly involved the abrogation of seniority rights held by Pacific Electric employees over the lines of that company, and the extension of seniority rights of Southern Pacific employees. Having held this agreement between the carriers to constitute a coordination, the neutral referee then commented as follows on the relationship between that agreement and existing contract rules (R. 302):

> "As pointed out in argument, the Washington Job Protection Agreement permits changes by carriers in work assignment that are not possible under rules agreements. But there is nothing in the Agreement which indicates or hints that such changes can be introduced through unilateral action not permitted by the rules agreements.
>
> "If the element of delay seems to strengthen the hand of an obdurate party; the way is open to invoke the powers of the Section 13 Committee which has in the past directed the proper bases for implementing coordinations. E.g. See Docket No. 4."

As stated by the neutral referee, unilateral action in effecting coordinations is no more contemplated under the Washington Agreement (in this case as modified by the Stipulation) than in the change of ordinary contract rules under the Railway Labor Act. The Washington Agreement, in fact, contains explicit provisions governing the procedures to be followed in processing and reaching agreement as to the details of any proposed coordination. These are set forth in Sections 4 and 5 of the Washington Agreement, and, for the purposes of this proceeding, in Section 2 of the Stipulation. That North Western has proceeded in accordance with these requirements is not in issue. Instead, the refusal of the labor organizations to fulfill their obligations under the Stipulation is based solely on their rejection of the very substance of the Stipulation.

By what means do the labor organizations endeavor to draw away from the obvious intent and purpose of their Stipulation? Basically, it is now suggested by them that the entire Stipulation derives its status from the provisions of the Railway Labor Act, to which the provisions of Section 5(2) (f) of the Interstate Commerce Act must be subordinated. Thus, there is torn from the context of the preamble to the Stipulation the phrase "pursuant to the provisions of the Railway Labor Act, as amended" (Petn., p. 5). By their attempted characterization of the Stipulation as a collective bargaining agreement subject to the processes of the Railway Labor Act, petitioners apparently seek to avoid any judicial consideration of the function of the Stipulation as an integral part of the Commission's order. Thus, the argument is made that the Stipulation, as a collective bargaining agreement under the Railway Labor Act, may be interpreted only in accordance with the procedures of that Act (Petn., pp. 18-19).

First, it must be recognized that the preamble to the

Stipulation may include a measure of ambiguity sufficient to impart some initial coloration to the artful suggestion now made that the Stipulation is a product of, and must be governed by, the procedures of the Railway Labor Act. The preamble in its entirety states (R. 200):

> "It is hereby stipulated and agreed by the parties hereto, by and through their respective attorneys signatory hereto, that by virtue of an agreement (copy of which is attached hereto as Exhibit A) executed by the Chicago and North Western Railway Company, the Minneapolis and St. Louis Railway Company and the Joint Committee of Railway Labor Organizations representing the organizations listed in the Appendix attached thereto *pursuant to the provisions of the Railway Labor Act*, as amended, the protection of the interests of the employees of the carrier parties to the above-entitled proceeding has been provided by said agreement, and any report and order issued by the Commission in said proceeding approving the application may so state."

Whether the phrase "pursuant to the provisions of the Railway Labor Act" was indeed intended to modify "an agreement * * * executed by," as now implied by the labor organizations or "representing the organizations listed in the Appendix" may not be immediately apparent from the literal provisions of the preamble.* The remaining provisions of the Stipulation, however, decisively establish

* The fact that the modification of the latter phrase was in fact intended is indicated by the provisions of both Section 5(2) (f) itself and Section 17 (1) of the Interstate Commerce Act. The former refers to "duly authorized representatives" of employees. The latter provides that "representatives of employees of a carrier *duly designated as such* may intervene and be heard in any proceeding arising under this Act affecting such employees." Section 2 of the Railway Labor Act governs the designation of employees' representatives. In order to establish the status of the "Joint Committee of Railway Labor Organizations" as "duly designated" or "duly authorized" representatives, is was appropriate to refer to their representation as being "pursuant to the provisions of the Railway Labor Act, as amended."

that the Stipulation was not regarded by the parties as a product of the Railway Labor Act.

As previously noted, Section 5(2) (f) imposes an affirmative obligation on the Interstate Commerce Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." The fact that such protective arrangement may be the product of agreement between a carrier and its employees under the concluding sentence of Section 5(2) (f) does not relieve the Commission of its fundamental obligation to provide for appropriate protection in its order, whether through its own initiative or by its acceptance of the arrangements agreed upon. This relationship between Section 5(2) (f) and the Stipulation was initially understood by the labor organizations as well as by North Western.

Incorporating the language of Section 5(2) (f) as to the Commission's obligation "to protect the interests of the railroad employees affected," the preamble of the Stipulation concludes as follows (R. 200):

> "* * * the protection of the interests of the employees of the carrier parties to the above-entitled proceeding has been provided by said agreement, and any report and order issued by the Commission in said proceeding approving the application may so state."

In similar recognition of the duty imposed on the Commission by Section 5(2) (f) to *require* a "fair and equitable arrangement," the entire Stipulation concludes (R. 203):

> "That in the event the Interstate Commerce Commission shall grant the authority requested in Finance Docket No. 21115, the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employees as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended."

The labor organizations now seek to evade the obvious intent of the parties by citing the Commission's finding that "(A)s to the employees covered by the stipulation, no conditions in our order are necessary." It is thus suggested by the labor organizations that the Stipulation was regarded by the Commission as a private affair between the parties and beyond the purview of its concern or responsibility under Section 5(2)(f). Such interpretation ignores the immediately preceding finding that "(T)he Stipulation is of the character contemplated by section 5(2)(f) of the Act for the protection of railway employees who may be adversely affected by the transaction authorized." (R. 238.) Quite clearly, the Commission responded to the Stipulation precisely as suggested by the parties; *i.e.*, it *accepted* the agreement "as one providing a fair and equitable arrangement for the protection of the interests of such employees as provided in Section 5(2)(f) of the Interstate Commerce Act." By this acceptance, the Commission discharged its obligation under Section 5(2)(f) to require a fair and equitable arrangement. If the parties at the time of its execution had deemed the Stipulation to have the status of a contract under the Railway Labor Act beyond the Commission's jurisdiction under Section 5(2)(f), reference to its acceptance by the Commission would have been without purpose.

To establish the incredibility of the contention that the Stipulation accepted by the Commission as fulfilling its obligations under Section 5(2)(f) results from, and is governed by, the Railway Labor Act, it is only necessary to consider what effect such status would have on the operation of Section 5(2)(f) of the Interstate Commerce Act. A "fair and equitable arrangement," once having been provided for by the Interstate Commerce Commission, would immediately become subject to modification through the collective bargaining procedures of the Railway Labor

Act. Thus, the orderly "selection of forces" in a coordination under Section 5 of the Washington Agreement could be displaced by the contract demands of a labor organization with greater economic strength for the exclusive right to positions in a coordinated operation. Or, indeed, under the provisions of the Railway Labor Act the carrier itself would be empowered to process its own demands for an abrogation of the very protective conditions which were the subject of the Stipulation.

The record in this proceeding demonstrates full well the understanding of the labor organizations that contracts subject to the Railway Labor Act evolve from notices served and processed in accordance with its provisions (R. 251-295). While not explicitly disclosed by this record for the reason that the matter was not in issue at the trial, the labor organizations also know full well that the Stipulation was neither proposed nor processed under the Railway Labor Act.* It was in fact expressly designed to apply to the specific transaction then pending before the Commission and to the resulting consolidation of particular facilities by the surviving carrier. Like the entire Section 5(2) transaction of which it is an integral part, the Stipulation under Section 5(2)(f) must be construed within the framework of Section 5(11) of the Interstate Commerce Act. Its effectuation must therefore be deemed free from any "restraints, limitations, and prohibitions" of the Railway Labor Act which would otherwise bar the use of its procedures in carrying out the authorized transaction.

* While respondent does not suggest that the substance of Section 5(2)(f) could in any event be subordinated to the form of a Section 6 notice under the Railway Labor Act, it is nonetheless significant that in this case no attempt was made by any party to comply with the procedures of the Railway Labor Act in the negotiations of the Stipulation. Moreover, the Stipulation is devoid of the usual provisions included in contracts negotiated under the provisions of the Railway Labor Act with reference to the manner of amending the contract (Def. Exs. 1-20; R. 246-247).

The judgment of the courts below that (1) the Railway Labor Act is inapplicable to the proposed coordination and that (2) the provisions of the Stipulation governed the proposed coordination involves no novel issues of law. It does no more than carry out the clear intent of the parties to an agreement whose mutuality the labor organizations have belatedly sought to evade.

## II.

### THE JUDGMENT BELOW DOES NOT PURPORT TO REQUIRE "SPECIFIC PERFORMANCE" OF AN AGREEMENT FOR "VOLUNTARY ARBITRATION," AS INTIMATED BY PETITIONERS.

In bringing this declaratory judgment action, the North Western did not seek injunctive relief to compel specific performance of an agreement to arbitrate. It has requested no more than the declaration of the rights of the parties to an actual dispute resulting in an impasse with respect to the procedures to be followed in effecting the proposed yard consolidation. The development of this dispute is set forth in the statement of the case in this brief. (See, in particular, *supra* pp. 8-13.) The judgment below, in keeping with the limited nature of this action, consists of a simple declaration of rights in relation to the legal controversy underlying the dispute. In itself, it defines no remedies to enforce its declaration; it compels no action by petitioners.

Whether petitioners anticipate a continuing impasse by seeking to construe the arbitration procedures of the Stipulation as "voluntary" is impossible to determine at this time (Petn., p. 19). Given the purpose and provisions of the Stipulation, it would appear as an absurdity to argue that in the absence of a voluntary agreement regarding the "displacement of employees or rearrangement of

forces" under Section 5 of the Washington Agreement, incorporated as a part of the Stipulation (R. 207), the arbitration provisions of Section 2 of the Stipulation (R. 203) are equally voluntary. What is significant here, however, is the fact that this issue was neither presented nor adjudicated below.

In any event, having refused to engage in conferences or to submit to arbitration in accordance with the Stipulation, petitioners now complain that the declaratory judgment of the courts below as to the applicability of the procedures of the Stipulation to the proposed coordination may in some manner prejudice their cause before any arbitration panel which might yet have occasion to consider its substance (Petn., p. 20; R. 348-351). Such fears have no foundation other than inself-serving fancy. Nevertheless, what the expression of such fears brings to mind is the legal apocrypha of the ingenuous youth, who, on being brought to the bar of justice for having effected the demise of his parents, complains of hostility shown to an orphan. Such pleas predicated upon the consequences of one's own contrivances (whether such consequences be real or imagined) are not foreign to the law, and petitioners have ably demonstrated that their varietal forms are endless.

## III.

## THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL

There has been extraneously and gratuitously injected into this proceeding the suggestion of a conflict between the decisions of the Court of Appeals for the Eighth Circuit below and the Court of Appeals for the Fifth Circuit in *Texas & New Orleans Railroad Co.* v. *Brother-*

*hood of Railroad Trainmen*, 307 F. 2d 141 (5th Cir., 1962); cert. den. 371 U. S. 952 (1963). This suggestion does not come from petitioners in this proceeding who appropriately observe that "(I)t may be that the facts involved in *Texas* are so different as to prevent the assertion of direct conflict between that decision and the decision of the Eighth Circuit to which this petition is filed." (Petn., p. 17.) The suggestion of direct conflict derives instead from the "Motion for Leave to File and Petition for Rehearing of Order Denying Petition for Writ of Certiorari" filed by petitioners in the *Texas & New Orleans* case, No. 589, October Term, 1962.

These petitioners fail to apprehend the strikingly dissimilar context from which emerged the respective opinions and judgments of the Courts of Appeal for the Fifth and Eighth Circuits.

In the *Texas & New Orleans* case, prior to their submitting a section 1(18) and 5(2) application to the Interstate Commerce Commission, the carriers, by the service of Section 6 notices, *voluntarily* subjected the negotiation of a new contract involving the rearrangement of forces to the processes of the Railway Labor Act (307 F. 2d 154). In these circumstances, it was the court's conclusion that having chosen to reach an agreement under the Railway Labor Act, the carriers could not abandon those efforts through the imposition of a unilateral arrangement by means of a third party contract covering the same subject, particularly while the newly proposed rules remained in mediation (307 F. 2d 154).

Referring to these belated efforts at unilateral action, the court noted:

> "Do the processes of section 5(2)(f) and the imposition upon the union of a minimum fair and equitable arrangement chosen without its consultation by the

> carrier provide a complete and proper channel for the compromise of the forces of capital and labor? Can they be compared with the machinery of the Railway Labor Act or the Labor Management Relations Act? We do not think so. The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair and inequitable." (307 F. 2d 157.)

The profound distinctions between the *Texas & New Orleans* case and the present proceeding are immediately apparent. Far from seeking to effect any rearrangement of forces in a yard consolidation by unilateral action, North Western has submitted the effectuation of its proposed coordination to the labor organizations in accordance with the provisions of Sections 4 and 5 of the Washington Agreement, which, as modified, has been expressly incorporated in a stipulation voluntarily entered into by the labor organizations as well as the carrier (R. 201, 207). If agreement cannot be reached through negotiation, the matter may be submitted to impartial arbitration.

The Fifth Circuit was not unaware of the possibility of agreements under Section 5(2) (f) of the character entered into between the parties to this proceeding. With reference to the distinction between such bilateral agreements and unilateral carrier action, the court observed:

> "It would further appear from sections 5(2) (e) and (f) that the representatives of the carrier employees are included among the interested parties to a transaction and that a new labor contract may be one of the ingredients of a transaction. Now, are we to read into the authority of the ICC to 'approve' a transaction, the right of the carrier to unilaterally create

"one of the contracts which may be necessary to the completion of that transaction and thereupon bind a third party to it? Clearly, that does not follow as a matter of course from the normal meaning of the terms used in section 5(2) (a)." (307 F. 2d 159.)

In the distinctive circumstances of these two cases, Section 5(11) of the Interstate Commerce Act may perhaps be held to operate with a differing effect; and it may be noted that there yet remains to be presented specifically and directly to the federal courts the effect of Section 5(11) on the operation of procedures formulated and imposed by the Interstate Commerce Commission under Section 5(2) (f), as distinguished from procedures arising from an express agreement between labor and management such as is found in the present case, or changes sought to be effected unilaterally by management, as in the *Texas & New Orleans* case. While the *obiter dicta* of the Fifth and Eighth Circuits may reflect a variance of views molded in part by the differing circumstances of the cases presented for decision, in the absence of adjudication of this remaining issue, there is no conflict now presented for resolution by this court.[*]

[*] It may be noted that the Court of Appeals below expressly limited its decision to the peculiar factual situation of the present case. (App. Pet. p. 44a.) Conversely, notice should be taken of the *dictum* to the opposite in the *Texas & New Orleans* case emanating from the Fifth Circuit Court of Appeals with respect to the authority of the Interstate Commerce Commission in the formulation of such labor conditions as it finds necessary to the public interest in connection with transactions approved under Section 5(2). (307 F. 2d 161.) As noted, however, this issue is not presented for decision by the circumstances of either of these cases.

## CONCLUSION.

For the reasons hereinabove stated, the petition for a writ of certiorari in this proceeding should be denied.

Respectfully submitted,

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